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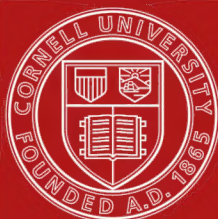
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**A treatise on the law of railroads.**



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WOOD ON RAILWAY LAW.

VOLUME I.

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A TREATISE  
ON  
THE LAW OF RAILROADS.

BY  
H. G. WOOD,  
AUTHOR OF "THE LAW OF LIMITATIONS," "NUISANCES," ETC.

IN THREE VOLUMES.

VOL. I.

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## PREFACE.

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THIS work was written for the benefit of practising lawyers, and with a view to aid them in the solution of vexed questions relating to railway law with which they may have to deal. With this single purpose in view, I have examined many thousand cases involving questions relating to the topics treated, have eliminated their doctrine, and as far as practicable stated the gist of them in the text or the notes. The most important topics have been carefully and fully treated, — such as relate to corporate powers, *ultra vires*, pooling contracts, the duties and liabilities of railway companies as carriers of passengers, negligence, tickets, the expulsion of passengers, the powers and duties of directors and other officers, eminent domain, municipal subscriptions, stockholders, etc. In the treatment of these topics, as well as others not enumerated, I have given the gist of many cases by way of illustration, and have endeavored as far as possible to make the work useful and practical. Having been for several years, before I commenced the work of writing text-books, attorney for a leading railway company, by a varied and extensive experience I learned some of the needs of the profession in a work upon this subject, and my aim has been to supply such a work as this experience suggested to be necessary for attorneys both for and against railway

companies. How far I have succeeded in accomplishing this purpose is not for me to say, but is for the profession to judge, when practical tests are applied to the work. Upon a subject involving so wide a field as that relating to railways, it could not of course be expected that I should treat it in *all* its details; I have confined myself as far as possible to those topics which are peculiar to this class of corporations, or to the peculiar application to them by the courts, of the law of corporations. If I have omitted anything which ought to have been embraced in the work, it is not because I have sought to shirk or evade any labor incident to the preparation of such a work, but is chargeable wholly as an error of judgment.

In using the table of cases, it should be borne in mind that courts and text-books sometimes cite cases with the full name of the railroad corporation, sometimes with the brief or popular name, and often merely as "Railroad." So far as possible, different citations of the same case, from different sources, have been placed under the full and proper name of the road; but as it has not been always practicable to trace up the cases inadequately cited, the reader who cannot find the case he seeks under its full title, will do well to look also under the word "Railroad."

H. G. WOOD.

Boston, Sept. 1, 1885.

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# LAW OF RAILROADS.

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## CHAPTER I.

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**SEC. 1. Railways — What are.**—A railroad has been defined to be a road or way on which iron rails are laid, for wheels of vehicles to run on.<sup>1</sup> In many of the early charters granted for the construction of railways, authority was given to build a railroad with “iron” rails; but, unless thus restricted, or expressly or impliedly prohibited, there can be no question but that a railway may be constructed with rails made from any suitable material; so that it may be said that “a railroad is a roadway upon which rails are laid suitable for the passage of vehicles adapted to use thereon.” When constructed under the authority of a grant from the legislature, or under the provisions of the general law, they are treated as improved highways,<sup>2</sup> to be used in a particular mode.<sup>3</sup> But they possess none of the

<sup>1</sup> Webster's Dictionary, “Railroads.” It is proper to state here, that the words “Railroads” and “Railways” are synonymous and interchangeable terms.

<sup>2</sup> HALL, J., in *White River Turnpike Co. v. Vt. Central R. R. Co.*, 21 Vt. 594. In *Central Crosstown R. R. Co. v. Twenty-Third St. R. R. Co.*, 54 How. Pr. (N. Y), 168, it was said that iron tracks or rails securely fastened to the soil, whether of a street or prairie, constitute a railroad, *irrespective of the propelling powers by which*

vehicles are transported thereon; and that the use of such railroad may be contracted for under a statute authorizing such contract, without any reference to the question whether such use is to be effected by horses or steam or by any other known or unknown motive power, and equally without regard to the nature of the locality through which such road may extend.

<sup>3</sup> *Walford on Railways*, 3, n. b. (Bennett's edn.).

essential features of a highway, and are not subject to the rules which are applied to highways; nor can they strictly be said to be "public" highways, because the public has no right to use them, except subject to such regulations as the company owning them prescribes, or by virtue of authority given by the legislature.<sup>1</sup> The public, as such, has no interest in the road itself, and is under no obligations in respect to it, and it is only by a legal fiction that it can be said to be a highway. In many of the early cases, in which questions arose as to whether these corporations were of such a public character that the lands of individuals could be taken for their construction, the courts likened railroads to highways, and put the right to take lands for their construction and operation upon the same grounds that lands may be taken for the construction of highways. But, as has before been stated, the points of resemblance in a legal sense are far-fetched and mythical, and at this time it is not deemed necessary to put their right to take private property for their construction upon any such ground.<sup>2</sup> The easement acquired over the lands taken for the construction of the road and its necessary appendages, is not an easement held by the public, or by the corporation as an agent of the public,<sup>3</sup> *but exists in favor of the corporation and is its property*,<sup>4</sup> and can only be used by it, or those holding under it, subject to the terms of the charter or grant, and such general laws as are fairly applicable to the corporation. No person can use the roadway, or any part thereof, for any purpose, without the consent of the corporation; nor can the legislature authorize its use by any other corporation, without providing for proper compensation to the corporation; and therefore the proposition that the public has an easement in the roadways is preposterous. A railroad may exist without rolling stock, and in the absence of any special or implied restriction in that respect in the charter or statute under which it is created, any species of motive power may be used thereon which the company chooses to employ; but if there is a restriction in that respect, such motors only can be employed as the statute designates; as, if the charter or general law authorizes the construction of a railroad "to be operated by steam," it can be operated only by steam;

<sup>1</sup> Central, &c. R. R. Co. v. Rockafellow, 17 Ill. 541; Burlington, &c. R. R. Co. v. Spearman, 12 Iowa, 112.

<sup>2</sup> Burlington, &c. R. R. Co. v. Mt. Pleasant, 12 Iowa, 112; Gibson v. Mason, 5 Nev. 283.

<sup>3</sup> BALDWIN, J., in Burlington, &c. R. R. Co. v. Mt. Pleasant, *ante*.

<sup>4</sup> Grand Rapids, &c. R. R. Co. v. Grand Rapids & Indiana R. R. Co., 35 Mich. 265.

or if it authorizes the construction of a "horse" or "street" railroad, to be operated by "horses," it can be operated only by that species of power; and if it becomes desirable to employ a different species of motor, authority must be obtained from the legislature. It is not necessary that the particular motive power to be employed should be specifically stated in the charter, in order to restrict it to a certain species of power; because in the absence of any such specific designation, if it is evident, upon an application of the charter to the subject matter of the grant, that a particular motive power was intended, the intention of the legislature so ascertained will be effectuated. Thus, if a charter is granted for a *street* railway, and throughout the State all such roads are operated by horses or mules, the charter will be construed as intending that only such species of power shall be employed, and the use of steam motors will be treated as excluded. So, upon the other hand, if a charter is granted for the construction of a railroad for the carriage of freight and passengers between certain points, and it is evident that the right to build and operate a railroad in the largest sense of the term was intended, the right to operate it by steam engines and such other motors or appliances as are usually employed in the operation of that class of railroads, will be implied; and in all such cases, where the charter itself is silent as to the motors to be employed, the rights of the corporation in that respect are to be ascertained by an application of the charter to the subject matter of the grant.

SEC. 2. *Individuals may build — When.* — Any person may build a railroad upon his own land, or even upon the land of others, with their consent, and may operate the same by steam or any other power he pleases;<sup>1</sup> but he does so at his peril, and has none of the privileges or immunities which are possessed by corporations

<sup>1</sup> Stewart's Appeal, 56 Penn. St. 413; McCandless' Appeal, 70 id. 210; Bank of Middlebury v. Edgerton, 30 Vt. 182; Bishop v. North, 11 Wall. (U. S.) 429; Dand v. Kingscote, 6 Wall. (U. S.) 174; Durham, &c. Railway v. Walker, 2 Q. B. 940; Brand v. Hammersmith L. R., 2 Q. B. 223. Railways, or tramways, as they were called, built by individuals, were quite common in England before railways were constructed for general purposes, and before the application of steam as a motive power. These were mainly built by the owners of mines and quarries, for private purposes; and such roads are also built in this coun-

try by individuals and corporations for similar purposes. These roads, in England, were built under what are called "way leaves," and under these it was held that the owners acquired the right to adopt any improvement either in the mode of construction or in motive power, and when steam engines came into general use for that purpose, it was held that the use of them by such persons came within the contemplation of the grant, although at the date of the grant the use of them was entirely unknown. Bishop v. North, *ante*; Barnard v. Wallis, 2 Railw. Cas. 162.

created for that purpose by the legislature, and is liable for all injuries arising either to the property or person of another by the operation of such road,<sup>1</sup> and for all nuisances arising from the noise, smoke, or other consequences of operating the road;<sup>2</sup> he is not only liable in damages, but also to indictment, where the nuisance is injurious to the public.<sup>3</sup> "I think, therefore," says CROMPTON, J., in the case last cited, "that the legal carrying out of such a scheme as the present, can only be effected by the authority of Parliament."<sup>4</sup> But the legislature may delegate authority to a municipal corporation to authorize or prevent the use of its streets for the construction of railroads, to be operated by steam or other power,<sup>5</sup> and in such a case, the action of the municipal government is conclusive. But even though such consent is given by the city, it amounts to nothing more than a license which is revocable at pleasure;<sup>6</sup> and in no event can such a license operate as a protection to the railway corporation against liability for a nuisance created by it, injurious to the property of any citizen.<sup>7</sup>

SEC. 3. **How created.** — Railroad companies, like all other corporations, derive their existence and all their powers from the sovereign authority, State or national;<sup>8</sup> but so far as railroad corporations are concerned, it is not believed that in the States, while Congress has the power to create them, it has the power to endow them with authority to take the lands of private persons for their construction, except under extraordinary circumstances, which are not likely to occur. The power of this class of corporations, as well as of all others,

<sup>1</sup> *Wilson v. Cunningham*, 3 Cal. 241.

<sup>2</sup> *Regina v. Train*, 3 F. & F. 22.

<sup>3</sup> *Regina v. Train*, *ante*.

<sup>4</sup> In this case a railway was laid in a public street by municipal authority only, and it was held to be a nuisance by reason of its obstruction to public travel. See, also, similar in principle, *Regina v. The Longton Gas Co.*, 8 Cox C. C. 817.

<sup>5</sup> *Buffalo, &c. R. R. Co. v. Buffalo*, 5 Hill (N. Y.), 209; *Veazie v. Mayo*, 45 Me. 560; *Great Western R. R. Co. v. Decatur*, 33 Ill. 381; *Bronson v. Philadelphia*, 47 Penn. St. 329.

<sup>6</sup> *N. Y. & Harlem R. R. Co. v. New York*, 1 Hilt. (N. Y. C. P.) 562.

<sup>7</sup> *Gas Co. v. Teel*, 20 Ind. 131.

<sup>8</sup> *Ernst v. Bartle*, 1 John. (N. Y.) Cas. 319. But it seems that the power to confer such franchise is vested exclusively in the

States, except as to such corporations as are fairly to be regarded as necessary to the successful accomplishment of the powers and functions delegated to Congress under the Constitution. *McCullough v. Maryland*, 4 Wheat. (U. S.) 316; *Osborne v. Bank*, 9 id. 73. In the territories and localities over which the general government has exclusive jurisdiction, Congress has authority to create either public or private corporations; and under the power given it to regulate commerce between the States, &c., there is no question but that it has authority to charter railroad corporations for the construction of railroads in the territories in its jurisdiction. *Thomson v. Pacific R. R. Co.*, 9 Wall. (U. S.) 579; *Pacific R. R. Co. v. Lincoln County*, 1 Dill. (U. S. C. C.) 314.



to take private property for its use is vested exclusively in the legislatures of the several States, and is an act of sovereignty, and has always been so regarded. Under the civil law, franchises could only be conferred by a decree of the senate or the imperial constitution;<sup>1</sup> and formerly in England, this was treated as the exclusive prerogative of the King.<sup>2</sup> But in this country the power is exclusively vested in the legislatures of the several States, and in Congress, as it is now in England regarded as being vested in Parliament, the assent of the King being presumed.<sup>3</sup> Railroad corporations, in this country, are created either by special charter or under general laws authorizing their formation; but in either case their powers are derived entirely from the legislature. Where a railroad corporation is created by special charter, that instrument contains the measure of its powers, except in so far as they are extended by general law, and usually these charters are quite uniform in their provisions, although in some of the States, in the early history of this class of legislation, in order to secure the carrying out of the enterprise, special and peculiar privileges and immunities were conferred, which are not to be found in any of the later charters, and in some instances, these charters are exempt from amendment or repeal by future legislatures for a period of fifty or a hundred years; and where such a provision exists, as we shall see hereafter, the corporation is beyond the reach of adverse legislation, except in so far as is warranted by the provisions of the act under which they are created. But in many of the States provision is made for the organization of this class of corporations under general laws, and the powers of the corporation are conferred thereby, and generally are subject to amendment or repeal by the legislature, — thus bringing them, as they should be, within the direct and immediate control of the sovereign power as to all matters except such as may be said to form a part of the contract between the sovereign and the corporation. But where the act creating a corporation does not reserve to the legislature the right to amend it, the legislature is held not to possess this power;<sup>4</sup> and if

<sup>1</sup> Ayliffe, 196; Domat's C. L. Prel. B. tit. 11, § 215; Brown's Civil Law, 143; Dig. vol. 47, tit. 22.

<sup>2</sup> 2 Bacon's Abr. tit. Corporations; 2 Kyd on Corporations, 42; 1 Blackstone's Comm. 472.

<sup>3</sup> 1 Roll. Abr. 512; 1 Bl. Comm. 473. In this country the exercise of the discretion by the legislature, in granting fran-

chise, is not open to revision by the courts of the United States. *Trust Co. v. Brady*, 20 Barb. (N. Y.) 119. The power of granting franchises is vested exclusively in the legislature. *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *Penn. & C. R. R. Co. v. Canal Co.*, 21 Penn. St. 9.

<sup>4</sup> *Hamilton v. Keith*, 5 Bush (Ky.), 458.

it only reserves the power to repeal it for certain causes, it has no power to repeal it for any other cause; nor has it the power to repeal it for any of the causes enumerated, without some inquiry, giving the corporation an opportunity to be heard in defence.<sup>1</sup>

**SEC. 4. Qualities and Requisites of a Corporation.**— A private corporation, strictly speaking, is a *legal person* endowed with all the rights and privileges of an individual, within the scope of the powers conferred upon it by the law which gives it the right to exist. It is composed of one or more persons constituting, under a particular name, one artificial person, without a soul, but enjoying the capacity of a continuous succession, and of perpetual existence and identity, unless its duration is limited by the law creating it, or its powers are taken away by statute or the judgment of a competent tribunal, upon proper proceedings to that end. Like a natural person, it may, unless restrained by law, in its corporate name, purchase, take, hold, and convey real or personal property, make contracts, employ agents, and prosecute the business for the prosecution of which it was organized, and sue or be sued, either in courts of law or equity. It may be said to be a *collection of persons, united by law into one body, and endowed with the capacity of a single person, within the scope of the express or implied powers with which it is endowed.*<sup>2</sup> It is a political, or civil institution,

<sup>1</sup> *Baltimore v. Pittsburgh, &c. R. R. Co.*, 1 Abb. (U. S.) 9. See *post*, chapter on "LEGISLATIVE CONTROL."

<sup>2</sup> Chief-Justice MARSHALL, in a leading case upon this branch of the law, says: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it is created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies — the hazardous and endless necessity of perpetual conveyances, for the purposes of

transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities, that corporations were invented, and are in use. By these means a perpetual succession of individuals is capable of acting for the promotion of the particular object, like one immortal being." *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 636. Judge DILLON (1 Dill. Municipal Corporations, § 8) says that a corporation is "a legal institution devised to confer upon individuals of which it is composed, powers, privileges, and immunities which they would not otherwise possess; the most important of which are continuous legal identity and perpetual or indefinite succession under the corporate name, notwithstanding successive changes, by death or otherwise, in the corporators or members of the corporation." Mr. KYD defines a corporation as being "a collection of many individuals united in one body, under a special de-

composed of one or more persons, legally organized with a particular name, and constituting in law but a single person, and having an identity and a legal existence and liability entirely separate and distinct from that of the members of which it is composed. Indeed, the principal object and purpose of private corporations is to enable *many persons* to concentrate their capital in the prosecution of a particular business, without incurring the personal risks or liabilities incident to the prosecution of business by an individual in his own name, or by an aggregation of individuals under a firm name; and to accomplish this result a corporation has a legal identity and liability entirely distinct from, and independent of, the persons or other corporations of which it is composed.

A corporation has an individuality and legal identity entirely distinct from the members of which it is composed, and as such, may make contracts, hold property, within the scope of its express or implied powers, precisely the same as an individual might do, and is subject to the same obligations and liabilities as a natural person would be; and within the scope of its powers, in its corporate name, unless prohibited by statute, may buy and sell property, real or personal, and sue and be sued, the same as though it was a natural person.<sup>1</sup> In these respects it has an individuality, identity, and *legal status*, entirely distinct from the members of which it is composed; and its members, except when specially made so by statute, are not personally responsible for its acts or debts, nor have they any title to the property of the corporation, real or personal, or right to interfere with or control the same. It may be said, that the corporation as such is the owner of all the property with which it is vested; and that its individual members are not, either

nomination; having perpetual succession under an artificial form, and vested by the policy of the law with a capacity of acting in several respects as an individual; particularly, of taking and granting property, contracting obligations, and of suing and being sued; of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive according to the design of its institution or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence." 1 Kyd on Corp. 13.

<sup>1</sup> As to right to sue, see *Bangor, &c. R. R. Co. v. Smith*, 47 Me. 34; *Baltimore,*

*&c. R. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655; *Heuston v. Cincinnati, &c. R. R. Co.*, 16 Ind. 275. As to its powers to make contracts, see *Baltimore v. Baltimore, &c. R. R. Co.*, 21 Md. 50; *South Wales R. R. Co. v. Redmond*, C. B. N. S. 675; *Shipper v. Pennsylvania R. R. Co.*, 47 Penn. St. 338; *Stewart v. Erie Trans. Co.*, 17 Minn. 372; *Davis v. Old Colony R. R. Co.*, 131 Mass. 238. As to its authority to purchase and hold property, see *Richardson v. Mass. Charitable Association*, 131 Mass. 174; *Crawford v. Longstreet*, 43 N. J. L. 325. Upon the propositions involved in the text, see chapter on "POWERS OF."

separately or jointly, the owners of any part thereof; and that their only interest therein is in the benefits which they may derive from its increase, or the loss which they may sustain from its destruction.<sup>1</sup>

Because of this legal identity, and of its responsibility as before stated, it is indispensable that a corporation should have a name, and no corporation can exist without one.<sup>2</sup> When it is created by a special charter, its name is generally designated therein; and when it is created under general laws, the name is given in the articles of association, and cannot be changed except by act of the legislature, or in some special mode provided by law.<sup>3</sup> The legislature may change the name of a corporation,<sup>4</sup> but great inconvenience would result if the corporation itself might change its name *ad libitum*. Corporations by prescription, it is said, may have several names, but where a corporation is created by a charter or under general laws, it can have but one name, and can only act by such name.<sup>5</sup> But in the case of contracts by or with a corporation, they cannot be avoided if the name of the corporation is *substantially* preserved, although the words composing it are not given in the same order as in the charter,<sup>6</sup> provided it is sufficient to describe the particular corporation, and does not describe any other corporation or person.<sup>7</sup> If a corporation adopts the same name that has previously been adopted by another corporation engaged in the same business,

<sup>1</sup> *Regina v. Arnaud*, 16 L. J. N. S. (Q. B.) 50; *Rand v. Hubbell*, 115 Mass. 461.

<sup>2</sup> "The name is, as it were, the very being of the corporation, without which they could not perform their corporate acts; for there is nobody to plead and be impleaded, to take and give, until it hath gotten a name." 2 Bacon's Abr. tit. Corporations (C.); Smith's Mer. Law, 133; 1 Dill. on Municipal Corp., § 117; 1 Comyn's Dig. tit. Franchise (F.), 9; 1 Kyd on Corp. 227. "Where," says Blackstone, 1 Bl. Comm. 474, "a corporation is erected, a name must be given to it, and by that name it must sue and be sued and do all legal acts, though a minute variation therein is not material. Such name is the very being of its constitution, and through it the will of the king, that erects the corporation, is expressed, and the name is the knot of its combination, without which it could not perform its corporate functions."

<sup>3</sup> In *Regina v. Registrar of Joint-Stock Companies*, 10 Q. B. 839, it was held that, after a company has been incorporated by a name set forth in the act of incorporation, it has no power to change it. "The identity of name," says the court, "is the principal means for effecting that perpetuity of succession with members frequently changing, which is an important purpose of incorporation; and the corporate name can be changed only by the same power by which the corporate body was created."

<sup>4</sup> *Rosenthal v. Madison*, P. R. R. Co., 10 Ind. 358.

<sup>5</sup> *College of Physicians v. Salmon*, 3 Salk. 102.

<sup>6</sup> *Newport Mfg. Co. v. Starbird*, 10 N. H. 123.

<sup>7</sup> *Button v. American Tract Society*, 23 Vt. 336; *Tucker v. Seaman's Aid Society*, 7 Met. (Mass.) 188; *Foster v. Walter*, Cro. Eliz. 106.

a court of equity, in a proper case, would enjoin the use of such name by it; and the same rule would doubtless be adopted where the name adopted was so similar to that of a corporation previously formed as to mislead the public in their dealings with the latter.<sup>1</sup> But in the case of railroad corporations, questions of this character will not be likely to arise.

SEC. 5. *Peculiar qualities of railroad corporations.* — A railroad corporation differs from ordinary corporations, in that, from the very nature of its business, it necessarily must be, and is, endowed with many prerogative franchises, which the legislature has no power to bestow on ordinary private corporations. In order to acquire its roadway, and screen itself from liability for the nuisances resulting from the running of its trains and the transaction of its general business, it must be clothed with extraordinary powers, as, the right to take lands for its roadways, whether the owner is willing or not; and in order to be clothed with these powers, without infringing the provisions of the national constitution, its purposes must be public, so that, while it is a private corporation, subject to the management of its stockholders, by whose capital and enterprise it was constructed, or is kept on foot, yet, by reason of the nature of its business, it is also a *quasi* public corporation,<sup>2</sup> by reason of its relation to the public, and its direct amenability to the sovereign power as to the manner in which its powers shall be exercised. Indeed, the right to build a railroad, and use it for the running of trains, and to charge for the transportation of passengers and freight over it, is a prerogative franchise, which can only be conferred by special grant; and as an equivalent for the grant of which, the sovereign power is necessarily clothed with the power to exercise a species of supervision and control which it does not possess in the case of ordinary private corporations.<sup>3</sup> When it is said that a railroad corporation is a *private* corporation, the term must be understood as implying merely that its stock is owned in whole or in part by individuals, and that it has acquired under its charter or organization certain vested rights of which the sovereign cannot deprive it. If the stock is *entirely* owned by the State, it then becomes a *public* corporation, and

<sup>1</sup> The London Ins. Co. v. The London and Westminster Ins. Co., 9 Jur. N. S. 943; Colonial Life Association Co. v. Home and Colonial Life Association Co., 33 Beav. 548.

<sup>2</sup> Holladay v. Patterson, 5 Or. 177; Holladay v. Davis, 5 id. 40.

<sup>3</sup> State v. Boston, &c. R. R. Co., 25 Vt. 433; Morris Canal, &c. Co. v. Townsend, 24 Barb. (N. Y.) 658.

subject in all matters to the control of the sovereign.<sup>1</sup> But, so long as *one* share, even, of the capital stock of a railway company is owned by an individual, it continues to be a private corporation, and the powers of the legislature over it are restricted accordingly. The primary object and purpose of the creation of this species of corporations, invested with such peculiar and extraordinary powers and privileges, is the great advantage to the public to be derived therefrom, in the increased facilities for transit from one point to another, and the transportation both of persons and property afforded thereby; and the advantages to be derived by the stockholders, by way of profits therefrom, is merely secondary, and in the main, subsidiary to the interest of the public. They owe certain duties to the State and the general public, which they cannot shirk or evade;<sup>2</sup> and a failure to discharge which, makes them amenable in damages to individuals who sustain special injury therefrom, and affords good grounds for a withdrawal of its franchises by the State; or the State (and sometimes individuals) may compel the performance of such duties through the intervention of the proper tribunal. Thus, they are bound, under reasonable limitations, to transport any person or any freight over their line, upon payment or tender of the regular fare or toll therefor, and upon refusal to do so, are liable to the person demanding such transportation for all such damage as he sustains by reason of such unreasonable refusal;<sup>3</sup> and the ground upon which this rule rests is that railroad companies are chartered solely for the purpose of performing the duties of common carriers,<sup>4</sup> and therefore are bound by the common-law rules relating thereto. So too, unless otherwise provided by statute, for the *same service the same rate of charges must be made to all their patrons*; or in other words, their charges for freight and passengers must be reasonably uniform;<sup>5</sup> and if any unreasonable discrimination is made, an action lies in favor of the person discriminated against, for the damages.<sup>6</sup> But it will not be profitable to pursue this subject in this place, as the matter will be

<sup>1</sup> Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518.

<sup>2</sup> Olcott v. Supervisors, 16 Wall. (U. S.) 678; Newburyport Turnpike Co. v. Eastern R. R. Co., 23 Pick. (Mass.) 326; Worcester v. Western R. R. Co., 4 Met. (Mass.) 564.

<sup>3</sup> See chapter on "CARRIERS."

<sup>4</sup> Chicago, &c. R. R. Co. v. The People, 67 Ill. 11.

<sup>5</sup> Chicago, &c. R. R. Co. v. Parks, 18 Ill. 460; Vincent v. Chicago, &c. R. R. Co., 49 id. 33; People v. Chicago, &c. R. R. Co., 55 id. 95; Ormsby v. Union Pacific Railroad Co., 2 McCreary (U. S. C. C.), 48.

<sup>6</sup> McDuffee v. Portland, &c. R. R. Co., 52 N. H. 430. See *post*, chapter on "CARRIERS."

treated fully under the head of "The Rights, Powers, Duties, and Liabilities of Railroad Companies."

SEC. 6. **Charters: Powers conferred by: Construction of.**—Where a railroad company is formed—as in many of the States they are required to be—under a special charter or grant, that, together with such general laws as they are made subject to, contains the measure of their rights and powers, together with such implied powers as are fairly incident to the exercise of the functions conferred.<sup>1</sup> And they can claim no powers not fairly given them in the act of incorporation;<sup>2</sup> and such powers cannot be created by implication, nor extended by construction, so as to confer any privilege not expressed in plain and unequivocal words.<sup>3</sup> It will be so construed as to give effect to its spirit as well as its letter,<sup>4</sup> and so as to carry out its general intent,<sup>5</sup> in subordination to its declared purpose,<sup>6</sup> and in accordance with all of its provisions.<sup>7</sup> In so far as they confer special privileges, they must be strictly construed;<sup>8</sup> and if there is any ambiguity or doubt in the expressions used, they will operate against the corporation;<sup>9</sup> and if the language of the charter in this respect is inconsistent with itself, such a construction will be put upon it as favors public convenience and trade, and abridges the grant.<sup>10</sup>

<sup>1</sup> *Com. v. Erie R. R. Co.*, 27 Penn. St. 339; *Perrine v. Chesapeake & Del. Canal Co.*, 9 How. (U. S.) 172; *Bellmeyer v. Marshalltown*, 44 Iowa, 564; *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83; *Smith v. Morse*, 2 Cal. 524; *Beatty v. Knowles*, 4 Pet. (U. S.) 152; *Montgomery v. Plank Road Co.*, 31 Ala. 76; *Caldwell v. Alton*, 33 Ill. 416; *Weekler v. First National Bank*, 42 Md. 581; *Macon v. Macon & Western R. R. Co.*, 7 Ga. 221; *Penn. R. R. Co. v. Canal Commissioners*, 21 Penn. St. 9.

<sup>2</sup> *Tenn., &c. R. R. Co. v. Adams*, 3 Head (Tenn.), 596.

<sup>3</sup> *Penn. R. R. Co. v. Canal Commissioners*, 21 Penn. St. 9; *Wright v. Briggs*, 2 Hill (N. Y.), 77. In *Camden & Amboy R. R. Co. v. Briggs*, 22 N. J. L. 623, it was held that the right to take tolls, freight, and fares can only be exercised under an express grant in the charter, and can never be raised by implication.

<sup>4</sup> *White v. Syracuse R. R. Co.*, 14 Barb. (N. Y.) 559.

<sup>5</sup> *Strauss v. Eagle Ins. Co.*, 5 Ohio St.

57; *Rex v. Cottrell*, 1 Br. Ald. 81. 1 Park Eton College, 20 L. J. N. S. 1.

<sup>6</sup> *Bennett's Appeal*, 65 Penn. St. 242.

<sup>7</sup> *Chesapeake, &c. Canal Co. v. Ohio R. R. Co.*, 4 G. & J. (Md.) 1; *Bennett's Appeal*, *ante*.

<sup>8</sup> *Charles River Bridge Co. v. Warren Bridge Co.*, 11 Pet. (U. S.) 420; *Thorpe v. Rutland, &c. R. R. Co.*, 27 Vt. 140; *Collins v. Sherman*, 31 Miss. 679; *Moorehead v. Little Miami R. R. Co.*, 17 Ohio, 340; *Newark Plank Road Co. v. Elmer*, 9 N. J. Eq. 754.

<sup>9</sup> *Scales v. Pickering*, 4 Bing. 448; *Richmond, &c. R. R. Co. v. Louisiana R. R. Co.*, 13 How. (U. S.) 71; *Com. v. Central Passenger R. R. Co.*, 52 Penn. St. 506; *Rice v. Railroad Co.*, 1 Black (U. S.), 358.

<sup>10</sup> *Collins v. Sherman*, *ante*; *Parker v. Great Western R. R. Co.*, 7 M. & G. 253; *Macon v. Macon, &c. R. R. Co.*, 7 Ga. 221; *Macon, &c. R. R. Co. v. Davis*, 13 id. 68; *Camden & Amboy R. R. Co. v. Briggs*, 22 N. J. L. 623; *Stockton, &c. Railway Co. v. Barrett*, 11 Cl. & F. 590;

The rights of the public are never *presumed* to be surrendered to a corporation; therefore, unless the intention to surrender such rights clearly appears in the charter, they will be denied.<sup>1</sup> But this principle will not be applied so as to defeat the manifest intention of the legislature, to be gathered by reference to the subject-matter contemplated, and the ends to be accomplished by the corporation;<sup>2</sup> *and the courts will give the charter such a construction as is necessary to effectuate all the powers, privileges, and immunities conferred by it, and as is necessary to carry into full effect its purposes and objects.*<sup>3</sup> It is upon this principle that it is held that a charter authorizing the construction of a railroad from one point to another, carries with it authority to take lands *necessary* for that purpose, although such authority is not expressly given;<sup>4</sup> or, where the charter authorizes the building of a railroad *which must necessarily cross a navigable stream*, that the charter *necessarily* confers authority to bridge the stream, although no such right is expressly conferred,<sup>5</sup> because, without such authority, the grant would be nugatory; and, while *prima facie* a charter does not confer such power, yet, as it is competent for the legislature to grant such authority, either expressly or by implication, *if it appears, upon an application of the charter to the subject-matter, that the railroad could not by reasonable intendment be built without bridging the river, authority to do so will be implied.*<sup>6</sup> And the same rule applies to the construction of a railroad on or

Florida, &c. *R. R. Co. v. Pensacola, &c. R. R. Co.*, 10 Fla. 145; *Bradley v. N. Y. & N. H. R. R. Co.*, 21 Conn. 245; *Heddy v. Wheelhouse, Cro. Eliz.* 558; *Binghamton Bridge Co.*, 3 Wall. (U. S.) 51.

<sup>1</sup> *Perrine v. Chesapeake, &c. Canal Co.*, 9 How. (U. S.) 172.

<sup>2</sup> *Curtis v. County of Butters*, 24 How. (U. S.) 435; *Moran v. Commissioners, &c.*, 2 Black (U. S.), 722.

<sup>3</sup> *Enfield Toll Bridge Co. v. Hartford, &c. R. R. Co.*, 17 Conn. 454; *Boston Water Power Co. v. Worcester R. R. Co.*, 23 Pick. (Mass.) 360; *Rogers v. Bradshaw*, 20 John. (N. Y.) 735. If a railroad corporation is authorized to build a bridge across a stream, such authority carries with it all the incidental rights and powers which are requisite to the efficacious and beneficial exercise and enjoyment of the right, which includes the right to build necessary and suitable ap-

proaches thereto, without which the bridge could not be operated at all. *Slatten v. Des Moines Valley R. R. Co.*, 29 Iowa, 148.

<sup>4</sup> *Tennessee, &c. R. R. Co. v. Adams*, 3 Head (Tenn.), 596. Where a charter authorized the construction of a bridge, it was held that the corporation was thereby authorized to take lands for the abutment upon making compensation, although the charter was silent upon that point. *Linton v. Sharpsburgh Bridge*, 1 Grant's Cas. (Penn.) 414.

<sup>5</sup> *Fall River Iron Works Co. v. Old Colony, &c. R. R. Co.*, 5 Allen (Mass.), 221. In *Works v. Junction R. R. Co.*, 5 McLean (U. S.), 425, it was held that authority to bridge a navigable stream must be implied from authority conferred to build a railroad between two termini "*over*" a navigable river.

<sup>6</sup> See cases cited in the last note. See "BRIDGES."



along a highway,<sup>1</sup> or upon lands already devoted to, and within the recorded location of another railroad company.<sup>2</sup>

SEC. 7. **Chartered by two or more States.** — There is no reason why a single corporation may not be created by the concurrent action of two or more States, for the construction or maintenance of a railroad, or the creation of a new corporation out of two or more corporations already existing, or indeed, the creation of a new corporation by one State, where one of the corporations is a foreign one;<sup>3</sup> but such new corporation, although endowed with the same name, powers, and capacities, and fulfilling the same duties, in both States, is nevertheless a *distinct corporation in each State*, and subject to diverse legislation in each State;<sup>4</sup> and while the courts will be likely to construe the several charters similarly, yet they cannot be regarded, as is stated in one case,<sup>5</sup> as a treaty between all the contracting States, because the States are prohibited from making treaties between each other, and cannot bind themselves either to pursue a certain line of legislation, or compel their judiciary to follow a particular line of construction, either of contracts between individuals, or between the State and individuals; and any statute to that effect, besides being obnoxious to the constitutional provision adverted to, would doubtless be regarded as void, as being in derogation of the sovereignty of the State, and opposed to sound public policy; and the Pennsylvania court, in the case referred to, undoubtedly used an unguarded expression, and merely intended to convey the idea that in such cases, the courts of the different States would probably, as far as possible, place the same construction upon the language and terms of the charter.

SEC. 8. **Conditions precedent to organization.** — If the charter or statute provides the mode in which the corporation shall be set on foot, or provides that certain things shall be done before it shall be endowed with corporate life, such mode, and such conditions precedent must be substantially complied with.<sup>6</sup> Thus, if the charter provides that a certain sum shall be expended within two years, and the road be completed within four years from the rising of the

<sup>1</sup> Springfield v. Connecticut River R. R. Co., 4 Cush. (Mass.) 63. See "HIGHWAYS." R. R. Co., 52 Penn. St. 228. See Sec. 14, *Domicile*.

<sup>2</sup> Housatonic R. R. Co. v. Lee, &c. R. R. Co., 118 Mass. 391. See "LOCATION OF RAILROAD." <sup>5</sup> Cleveland, &c. R. R. Co. v. Speer, 56 Penn. St. 325.

<sup>3</sup> Bishop v. Brainerd, 28 Conn. 289. <sup>6</sup> Danbury, &c. R. R. Co. v. Wilson, 22 Conn. 435; Erie, &c. R. R. Co. v. Casey, 26 Penn. St. 287.

<sup>4</sup> Alleghany County v. Cleveland, &c.

legislature, or the charter shall become void, both the expenditure of the money and the completion of the road within the times respectively named therefor, are conditions which must be complied with or the corporate rights conferred by the charter are lost, unless restored or extended by the legislature.<sup>1</sup> But where a condition is imposed, with a reservation of a right to repeal the charter in case it is not performed, the franchise is not invalidated by the breach of the condition, but the corporation holds it as a tenant at will, and the legislature may exercise its right to repeal at any time, unless it has expressly condoned the breach:<sup>2</sup> and the mere circumstance that the corporation, after breach, has been compelled by judicial proceedings to perform the condition, does not take away the power of the legislature to repeal the charter.<sup>3</sup> The condition imposed by the legislature, if *substantially* performed, with a *bond fide* purpose to perform it, will save the charter, although the performance is not literal;<sup>4</sup> but otherwise, if the performance is not *bond fide*. Thus, where the law required that payment of ten per cent of the subscriptions should be made in good faith before incorporation, and the incorporators gave their check for that amount upon a bank in which they had no funds, it was held that such payment was not a compliance with the condition, even though it appeared that the bank would have paid the check if presented.<sup>5</sup> But where the charter provides that a certain sum per mile shall be subscribed, and ten per cent paid thereon in good faith, it is not necessary to the performance of the condition that each subscriber shall pay ten per cent upon the amount subscribed by him, but if that proportion on the whole sum subscribed is paid, the condition is complied with.<sup>6</sup> In the absence of any provision in the charter or general law relative thereto, it is held in most of the States of this country that the whole amount of the capital stock must be subscribed for, unless a contrary intention appears expressly or by inference either from the charter or the contract subscription, before the corporation can go into operation.<sup>7</sup> But in

<sup>1</sup> Danbury, &c. R. R. Co. v. Wilson, *ante*.

<sup>2</sup> Erie, &c. R. R. Co. v. Casey, 26 Penn. St. 287.

<sup>3</sup> *Id.*

<sup>4</sup> Oraville, &c. R. R. Co. v. Plumus Co., 37 Cal. 354.

<sup>5</sup> People v. Chambers, 42 Cal. 201.

<sup>6</sup> Ogdensburgh, &c. R. R. Co. v. Frost, 21 Barb. (N. Y.) 541.

<sup>7</sup> Shurtz v. S. & T. R. R. Co., 9 Mich.

269; People v. The Troy, &c. Canal Co., 44 Barb. (N. Y.) 625; Peoria, &c. R. R. Co. v. Preston, 35 Iowa, 115; Salem Mill Dam Co. v. Ropes, 6 Pick. (Mass.) 23; Newburyport Bridge v. Story, 6 id. 45 n; Cabot v. Chapin, 6 Cush. (Mass.) 50; Troy & Greenfield R. R. Co. v. Newton, 8 Gray (Mass.), 596; Worcester & Nashua R. R. Co. v. Hinds, 8 Cush. (Mass.) 110. The rule as stated in the text is the rule when the charter fixes

New York it is held that a subscription to the whole capital stock is not a condition precedent to its corporate existence, unless made so by the act of incorporation<sup>1</sup> and such also is now the rule in England.<sup>2</sup> Where the statute requires that a certain number of shares shall be subscribed for before the company is organized, it is held that the decision of a majority of the subscribers that this condition has been complied with, and the actual organization of the company in pursuance thereof, is binding upon the minority,<sup>3</sup> but not upon the State, or third persons affected thereby; in other words, that a corporation *de facto* is formed whose validity can only be questioned by the State. If all of the precedent conditions of the charter have been performed, it is sufficient, although they have not been performed in the order named in the charter;<sup>4</sup> and generally, a liberal construction will, and should be placed upon the provisions of a charter relating to the steps to be taken for an organization under it, and if the law has been substantially — although not literally — complied with, it is sufficient.<sup>5</sup> Even if there are inherent and fatal defects in the organization, yet if the legislature subsequently recognizes it as a regularly formed corporation; such defects are thereby cured.<sup>6</sup>

SEC. 9. *De facto corporations.* — If a corporation is defectively organized, it may nevertheless, be a *de facto* corporation if it acts as a corporation, and, unless guilty of bad faith in the matter, may discharge the ordinary functions of a corporation, and subsequently perfect the organization.<sup>7</sup> Thus, where the act incorporating a rail-

the capital stock or the number of shares, *Salem Mill Dam v. Ropes, ante*; or the number of shares is fixed in the contract of subscription, *Cabot v. Chapin, ante*; and does not apply when neither the act of incorporation nor the contract of subscription fixes the number of shares, *City Hotel v. Dickinson*, 6 Gray (Mass.), 586; nor when the charter authorizes the corporation to commence business when less than the whole number of shares has been subscribed for, *Boston, Barre, & Gardner R. R. Co. v. Wellington*, 113 Mass. 79; *Penobscot, &c. R. R. Co. v. Bartlett*, 12 Gray (Mass.), 244. But where the act of incorporation provides that the capital stock shall consist of not more than a certain number of shares, the number of which shall be fixed from time to time by the directors, it is held that the directors have no power to levy assessments before determining the whole number of shares.

*Troy, &c. R. R. Co. v. Newton, ante*; *Worcester, &c. R. R. Co. v. Hinds*, 8 Cush. (Mass.) 110.

<sup>1</sup> *Schenectady, &c. Plank Road Co. v. Thatcher*, 11 N. Y. 102; and see *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46.

<sup>2</sup> *McDougall v. Jersey Imperial Hotel Co.*, 2 H. & M. 528.

<sup>3</sup> *Strauss v. Eagle Ins. Co.*, 5 Ohio St. 59.

<sup>4</sup> *Eakright v. Logansport, &c. R. R. Co.*, 18 Ind. 404.

<sup>5</sup> *People v. Stockton, &c. R. R. Co.*, 45 Cal. 306.

<sup>6</sup> *State v. Hudson Tunnel R. R. Co.*, 38 N. J. L. 548.

<sup>7</sup> *Hoagland v. Cincinnati, &c. R. R. Co.*, 18 Ind. 452; *Heuston v. The Cincinnati, &c. R. R. Co.*, 16 id. 275; *Lake Ontario, &c. R. R. Co. v. Mason*, 16 N. Y. 456; *Cayuga Lake R. R. Co. v. Kyle*, 64 N. Y. 185.

road company declared it in one section to be "a body politic and corporate," and in another section provided that "when \$100,000 shall have been subscribed, and \$1 on each share shall have been paid in, the company may organize and begin to work," it was held that if the \$100,000 was subscribed, and a gross sum was paid in equal to \$1 on each share, the company could organize and proceed to work; and that the failure strictly to comply with the requirement of the act, would not affect the corporate existence, but would be merely an irregularity which would not defeat the right of the company to recover a subscription for its stock.<sup>1</sup> Indeed, the ability of a railroad corporation *de facto* to contract or to sue, cannot be questioned in an action brought by it to recover upon the evidence of a debt given to it,<sup>2</sup> and a private person cannot question its organization.<sup>3</sup> But if there was *no authority of law* for the organization of the corporation, a party dealing with it is not estopped from denying its corporate existence.<sup>4</sup> Thus, where the statute expressly required certain acts to be done in order to constitute a corporation, it was held that *the entire omission of those acts* could not be supplied by the application of the doctrine of estoppel, and that the fact that it held itself out as a corporation, did not estop it from denying its own corporate existence;<sup>5</sup> and in order to estop a third person from denying its corporate existence, there must be proof that it was a *de facto* corporation, such as professed compliance with a law authorizing its organization, and some evidence of subsequent user.<sup>6</sup> But if there was *any* legal authority, and an attempt to comply with the necessary requirements of the law, although defective, a *de facto* corporation is created, the legal existence of which can only be questioned by the State.<sup>7</sup> The reason for this is, that in the latter case there is a colorable right to form a corporation, and a compliance with the *necessary* requirements of the law although the organization was defective, yet the State alone could question its legal existence,<sup>8</sup> while in the former case there was no

<sup>1</sup> S. & A. R. R. Co. v. Ezell, 14 S. C. 281.

<sup>2</sup> Commissioners of Douglass Co. v. Bolles, 94 U. S. 104; Wilcox v. Toledo, &c. R. R. Co., 43 Mich. 584.

<sup>3</sup> Wilcox v. Toledo, &c. R. R. Co., *ante*.

<sup>4</sup> Snyder v. Studebaker, 19 Ind. 462; Boyce v. Trustees of Methodist Church, 46 Md. 359; Barton v. Schilbach, 45 Mich. 504; Vredenburg v. Behan, 33 La. An. 627.

<sup>5</sup> Boyce v. Trustees of M. E. Church, *ante*.

<sup>6</sup> Merriman v. Magiveny, 12 Heisk. (Tenn.) 494; Fredenburg v. Lyon Lake M. E. Church, 37 Mich. 476.

<sup>7</sup> Dobson v. Simonton, 80 N. C. 492; Spahr v. Farmers' Bank, 94 Penn. St. 420.

<sup>8</sup> Buffalo, &c. R. R. Co. v. Cary, 26 N. Y. 77; Kurtz v. Paola Town Co., 20 Kan. 403.

authority whatever for the formation of the corporation, and consequently, no corporation either *de jure* or *de facto* could be created.<sup>1</sup>

This distinction was observed in a California case,<sup>2</sup> the court saying, "There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question."

In a Missouri case<sup>3</sup> an action was brought upon a promissory note, purporting to be executed by the directors of the North Missouri Central District Stock, Agricultural, and Mechanical Association. The action was brought against the directors, upon the ground that the association was not incorporated at the time the note was given, and that the directors were therefore individually liable. It appeared that the association, at the time the note was given, was fully incorporated in every respect, *except that it had failed to file its articles of incorporation with the Secretary of State, as the statute required*. It was held that the directors were individually liable.

In an Illinois case,<sup>4</sup> the defendants were held liable as partners for goods sold to an assumed corporation, of which they were members. The defect in the incorporation consisted in a failure to file the articles of incorporation with the clerk of the city where the corporation was to transact its business. In that case the court said: "There is a manifest difference where a corporation is created by a special charter, and there have been acts of user, and where individuals seek to form themselves into a corporation under a general law. In the latter case it is only in pursuance of the provisions of the statute for such purpose that corporate existence can be acquired. And there would seem to be a distinction between a case where, in a suit between a corporation and a stockholder or other individuals, the plea of *nul tiel corporation* is set up to defeat a liability which he may have contracted with the other, and the case of a suit against individuals who claimed exemption from individual liability on the ground of their having become a corporation formed under the pro-

<sup>1</sup> *Kaiser v. Lawrence Savings Bank*, 56 Iowa, 104.

<sup>2</sup> *Mokelumne Hill Mining Co. v. Woodbury*, 14 Cal. 424.

<sup>3</sup> *Burt v. Salisbury*, 55 Mo. 316.

<sup>4</sup> *Bigelow v. Gregory*, 73 Ill. 197.

visions of a general statute. In the latter case a stricter measure of compliance with statutory requirements will be required than in the former.”<sup>1</sup> A *de facto* corporation exists when there has been an honest attempt to comply with the requirements of the charter or general law, but in some respects the attempt has failed. Thus, where *twenty-four* persons subscribed articles of incorporation, while the statute required *twenty-five*, and filed the same pursuant to the statute, and exercised the powers and franchises which would have belonged to them if duly incorporated, they become *de facto* a corporation, and a defendant in an action brought by the corporation cannot question the validity of its incorporation. That can be done only in an action by the people, brought for the purpose of testing its right to the corporate powers and franchises which it has assumed. It was also held in the same case, that a resolution of the common council of a city giving to a railroad corporation permission to lay its tracks in the streets of the city, is not the grant of a franchise, but is simply a license. No estate or property right whatever was granted to it, for the city had no power to grant any, nor to confer upon it any franchise. The streets are held in trust for the people, and are not corporate or municipal property. Therefore, where the city reserved the right to revoke the license for non-compliance with its conditions, it may do so by resolution, without obtaining a judgment declaring the forfeiture.<sup>2</sup>

While some diversity of opinion is found in the courts of the different States as to when the existence of a corporation may be questioned, if at all, in a collateral proceeding, the authorities are almost unanimous in holding that such collateral inquiry cannot be made touching the corporate existence of a *de facto* corporation when there was a lawful authority for its creation.<sup>3</sup> And where one deals with a *de facto* corporation as such, the existence of whose corporate powers he is estopped from denying, a member of the corporation cannot be held by him upon his contract made with the corporation as a copartner. And it does not follow, as a rule of law, if the legal

<sup>1</sup> See also *Abbott v. Omaha Smelting Co.*, 4 Neb. 416, and *Harris v. McGregor*, 29 Cal. 125.

<sup>2</sup> *Buffalo City Railway Co. v. N. Y. Cent., &c. R. Co.*, Buffalo Sup. Ct., 1880. As to the last point, see also *Chicago, &c. R. Co. v. People*, 13 Ill. 547.

<sup>3</sup> *Cochran v. Arnold*, 58 Penn. St. 405;

*Rondell v. Fay*, 32 Cal. 354; *Baker v. Administrator of Backus*, 32 Ill. 110; *Tarbell v. Page*, 24 id. 46; *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89; *Hubbard v. Chappel*, id. 601; *Heaton v. Cin., &c. R. Co.*, 16 id. 279; *Washington College v. Duke*, 14 Iowa, 17; *Slocum v. Providence, &c. Co.*, 10 R. I. 114.

existence of the corporation could be attacked and overthrown, collaterally or otherwise, that the members of such *de facto* corporation would be liable as members of a copartnership.<sup>1</sup>

A corporation *de facto* may exercise the rights conferred by the charter and discharge all the functions of a corporation against everybody except the State, and an objection will not lie on the part of an adverse party to a plea in behalf of a corporation, that the persons making the plea as officers of the corporation are not legally such. The managers or directors of a corporation are usually selected by its proprietors or stockholders; whether they select eligible persons or not, or the persons selected are appointed in a legal way or not, is a matter of no concern to third persons. If the officers selected are ineligible, or are elected irregularly or illegally, but are allowed by the proprietors of the corporation to take control of its property, and to exercise its functions and powers, they become officers *de facto*, and as such may act for and bind the corporation. An officer *de facto* is one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law.<sup>2</sup> From a very early time it has been held that the acts of *de facto* officers are binding upon the corporation, until they are lawfully ousted, especially so far as their acts create rights in favor of third persons.<sup>3</sup> A suit brought by the *de facto* officers of a corporation cannot be defeated by showing that such officers were not legally elected. That fact constitutes no defence whatever to the action, especially in a case where there are no other officers claiming to represent the corporation.<sup>4</sup>

Not only may a *de facto* railroad corporation sue and be sued, but it may also exercise the right of eminent domain, and construct and operate its road, and is entitled in all respects to the immunities and privileges which are possessed by a *de jure* corporation, except as against the State.<sup>5</sup> The question as to whether such a corporation

<sup>1</sup> Ossipee Mfg. Co. v. Canney, 54 N. H. 295; Fuller v. Rowe, 57 N. Y. 26; Whipple v. Parker, 29 Mich. 380; Abbott v. Omaha Smelting Co., 4 Neb. 423; Tarbell v. Page, 24 Ill. 47; Stowe v. Flagg, 72 id. 397. The case of Fay v. Noble, 7 Cush. (Mass.) 189, is a strong authority and directly in point, that a partnership liability does not attach to the members of an irregularly organized or illegally assumed corporation. Humphrey v. Mooney, 5 Col. 582.

<sup>2</sup> King v. Bedford Level, 6 East, 369.

<sup>3</sup> Doremus v. Dutch Reformed Church, 3 N. J. Eq. 349.

<sup>4</sup> Charitable Association v. Baldwin, 1 Met. (Mass.) 359; Green v. Cady, 9 Wend. (N. Y.) 414; Mechanics' National Bank of Newark v. Burnet Manufacturing Co., 33 N. J. Eq. 486.

<sup>5</sup> Reisner v. Strong, 24 Kan. 410; McAuley v. Columbus, &c. R. R. Co., 83 Ill. 348.

is exempt from indictment for a public nuisance necessarily created by it in the construction and operation of its road, has not been directly decided, but the courts would doubtless be inclined to hold that, so long as the State had not adopted measures to deprive the corporation of its franchises, it must be treated as ratifying its acts, and, until the corporation was declared illegal, would be estopped from prosecuting it for the exercise of an act which, as a corporation *de jure*, it could legally exercise.<sup>1</sup>

**SEC. 10. Acceptance of the grant or amendments thereto.**—In the case of a corporation created by special charter, there must be an acceptance of the grant by the corporators in order to create a corporation, as no one can be made a corporator against his will;<sup>2</sup> but unless the statute expressly provides the mode in which such acceptance shall be signified, it may be inferred from the exercise by them of corporate acts under the grant,<sup>3</sup> and it is not necessary that the records of the corporation should show a formal acceptance.<sup>4</sup> It is sufficient, if it is shown that they have exercised any of the powers granted,<sup>5</sup> and from such acts an acceptance may be inferred.<sup>6</sup>

<sup>1</sup> See chapter on "NUISANCES."

<sup>2</sup> *State v. Dawson*, 16 Ind. 40; *Haslett v. Watherspoon*, 1 Strobb. (S. C.) 209; *Lincoln, &c. Bank v. Richardson*, 1 Me. 81. The sovereign authority cannot compel persons to become a corporation. The grant is in the first instance a mere offer of corporate powers and privileges, which they may accept or not, at their option. But if they assume to act under the grant, they then become a corporation and subject to all liabilities as such. *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344; *Ellis v. Marshall*, 269; *Attorney-General v. Draper & Co.*, 6 Beav. 382; *Askew's Case*, 4 Burr. 2200.

<sup>3</sup> *Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654; *Lyons v. Orange, &c. R. R. Co.*, 32 Md. 18; *Goodin v. Evans*, 18 Ohio St. 150; *Dayton, &c. R. R. Co. v. Hatch*, 1 Dis. (Ohio) 84; *Hope, &c. Ins. Co. v. Beckmann*, 47 Mo. 93; *Covington v. Covington, &c. Bridge Co.*, 10 Bush (Ky.), 69; *Logan v. McAllister*, 2 Del. Ch. 176; *Heath v. Silverthorn Lead, &c. Co.*, 39 Wis. 146; *Cincinnati, &c. R. R. Co. v. Cale*, 29 Ohio St. 126; *Talladega Ins. Co. v. Landers*, 43 Ala. 115; *State v. Dawson*, 16 Ind. 40.

<sup>4</sup> *Russell v. McLellan*, 14 Pick. (Mass.)

63; *Taylor v. Newbern*, 2 Jones (N. C.) Eq. 141; *School District, &c. v. Gibbs*, 2 Cush. (Mass.) 39; *Sumrall v. Sun Mutual Ins. Co.* 4 Ohio, 27; *Hudson v. Carman*, 41 Me. 84; *Mead v. Keeler*, 24 Barb. (N. Y.) 20; *Taylor v. Griswold*, 14 N. J. L. 283.

<sup>5</sup> *Riddle v. Proprietors, &c.*, 7 Mass. 184; *Com. v. Cullen*, 13 Penn. St. 133; *Goshen Turnpike v. Sears*, 7 Conn. 86. Not only acceptance, but also due organization of a corporation, may be presumed from a long exercise of corporate rights. *Middlesex Husbandmen, &c. v. Davis*, 3 Met. (Mass.) 133; *Gifford v. N. J. R. R. Co.*, 10 N. J. Eq. 171.

<sup>6</sup> *Taylor v. Newbern, ante*; *Bangor, &c. R. R. Co. v. Smith*, 47 Me. 34; *Wetumpka, &c. R. R. Co. v. Bingham*, 5 Ala. 657; *Androscoggin Bridge Co. v. Bragg*, 11 N. H. 102; *South Meadow Dam Co. v. Gray*, 30 Me. 547; *Penobscot Boom Co. v. Lamson*, 16 Me. 224; *Crump v. U. S. Mining Co.*, 7 Gratt. (Va.) 352; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335; *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. (Mass.) 282. Grants beneficial to a corporation may be presumed to have been accepted, and when acts of the corporation are shown which



And where the corporators applied for the grant, it is held that no proof of acceptance is required;<sup>1</sup> but this is subject to the condition that the grant is identical with that applied for; because, if the legislature imposes restrictions or conditions which materially differ from the rights and privileges applied for, it could hardly be said that the mere circumstance that a grant was applied for, binds the corporators *volens volens*. And the acceptance is in such cases treated as being unconditional, because a corporation can only accept the grant *in toto*, and cannot accept it in part, and reject it in part.<sup>2</sup> Before acceptance of the grant, it may be repealed or withdrawn at any time,<sup>3</sup> although no power of repeal is reserved in the grant.<sup>4</sup> But after its acceptance by the corporators, the power of repeal, unless reserved in the act, is gone; and the corporators cannot withdraw from the duties and liabilities which the charter imposes, unless discharged by a forfeiture or repeal.<sup>5</sup> The acceptance of an amendment to the charter, or law under which the corporation is formed, which the legislature would have no power to make without the consent of the corporation, may be established by showing that the corporation has, since its enactment, done acts authorized by the amendment, but which without the amendment, would have been unauthorized.<sup>6</sup> Thus, in an Ohio case<sup>7</sup> the charter of a railroad corporation, incorporated by a special act of the legislature, empowered the directors to transact all the business of the company, but did not expressly authorize subscription to the capital stock in real estate. This privilege was subsequently conferred by a general railroad act upon all railroad corporations then existing that might

would not be authorized except for such grant, this presumption becomes absolute, even though the act provides for a special mode of acceptance, which has not been pursued. *Owen v. Purdy*, 12 Ohio St. 73; *Bangor, &c. R. R. Co. v. Smith*, 47 Me. 34.

<sup>1</sup> *State v. Dawson*, 16 Ind. 272; *Perkins v. Sanders*, 56 Miss. 733; *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

<sup>2</sup> *Rex v. Westwood*, 7 Bing. 1; *Ewre v. Strickland*, Cro. Jac. 240; *Rex v. Passmore*, 3 T. R. 199; *Rex v. Amery*, 1 id. 575; *Bushwick, &c. Bridge Co. v. Ebets*, 3 Edw. (N. Y.) Ch. 353.

<sup>3</sup> *Mississippi Society v. Musgrave*, 44 Miss. 820; 7 Am. Rep. 723.

<sup>4</sup> *State v. Dawson*, 16 Ind. 40; *State v. Roosa*, 11 Ohio St. 16; *Chesapeake, &c. Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J.

(Md.) 1; *Lincoln v. Kennebec Bank*, 1 Me. 79; *Ill. River R. R. Co. v. Zimmer*, 20 Ill. 654; *Galena, &c. R. R. Co. v. Appleby*, 28 Ill. 283; *Winter v. Muscogee R. R. Co.*, 11 Ga. 438; *Joy v. Plank Road Co.*, 11 Mich. 155; *Fry v. Lexington, &c. R. R. Co.*, 2 Met. (Ky.) 314.

<sup>5</sup> *Goshen Turnpike Co. v. Sears*, 7 Conn. 86; *Riddle v. Proprietors, &c.*, 7 Mass. 169; *Busey v. Hooper*, 35 Md. 15.

<sup>6</sup> *Kenton County Court v. Bank Lick Turnpike Co.*, 10 Bush. (Ky.) 529; *Hope Ins. Co. v. Koeller*, 47 Mo. 93; *Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654; *Lincoln v. Kennebec Bank*, *ante*; *Galena, &c. R. R. Co. v. Appleby*, 28 Ill. 283.

<sup>7</sup> *Goodin v. Evans*, 18 Ohio St. 150.

accept the powers so conferred. After the passage of the general act, the directors entered on the records of the company a resolution that subscriptions to the capital stock might be made in real estate. The company then received real estate subscriptions to its stock, and sold and conveyed the same to *bond fide* purchasers, with the knowledge of such subscribers, and without objection on their part until many years after, when the stock had become worthless, and the enterprise for which the company was organized had been abandoned. In an action by a subscriber to recover back the land conveyed by him to the company on such subscription, it was held that proof of the exercise of the privileges conferred by the general act upon the company, under a resolution of the directors, and with the acquiescence of the parties to the suit, was sufficient evidence, as between them, that the company had accepted the powers conferred in that section, and was thereby authorized to take and convey land received by it on subscriptions for its capital stock.<sup>1</sup> Of course, as to amendments which the legislature has authority to make without the consent of the corporation, they are binding upon the corporation at all events;<sup>2</sup> but an amendment which fundamentally changes the object and purposes of the act of incorporation, may be resisted by the corporation and cannot be made binding upon it without its consent.<sup>3</sup>

**SEC. 11. Organization.** — All conditions precedent set forth in the charter or general law must be substantially performed, before a legal organization of the corporation can be effected; and too, the mode provided in the charter must be substantially pursued, and all the requirements of the charter or general law must be complied with.<sup>4</sup> If the charter provides for the giving of notice to the corporators or stockholders in a certain way, and of a certain time before the first meeting for the organization of the corporation, notice must be given in the mode, and of the duration provided; although mere irregularities in this respect cannot be taken advantage of collaterally,<sup>5</sup> and if enough has been done to create a corporation *de*

<sup>1</sup> See also, to the same effect, *Hope Ins. Co. v. Beckmann*, 47 Mo. 93; *Bangor, &c. R. R. Co. v. Smith*, 47 Me. 34.

<sup>2</sup> *Navigation Co. v. Coon*, 6 Penn. St. 372.

<sup>3</sup> *Fry v. Lexington, &c. R. R. Co.*, 2 Met. (Ky.) 314; *Joy v. Jackson, &c. Plank Road Co.*, 11 Mich. 155.

<sup>4</sup> *Burt v. Farrar*, 24 Barb. (N. Y.) 518; *Oraville, &c. R. R. Co. v. Plumas Co.*, 37

Cal. 354; *Buffalo, &c. R. R. Co. v. Cary*, 26 N. Y. 75.

<sup>5</sup> *Lehman v. Warner*, 61 Ala. 455; *Cochran v. Arnold*, 58 Penn. St. 399; *Eaton v. Aspinwall*, 19 N. Y. 119; *Cincinnati, &c. R. R. Co. v. Danville, &c. R. R. Co.*, 75 Ill. 113; *Taggart v. Western, &c. R. R. Co.*, 24 Md. 563; *Hanover, &c. R. R. Co. v. Haldeman*, 82 Penn. St.

*facto*, defects in the organization may be waived by a legislative recognition of the corporation as a subsisting one.<sup>1</sup> But an *illegally* organized corporation has no valid existence, and can have no property in money advanced for its use by private parties.<sup>2</sup> So too, it is held that there is a distinction between the effect of a special charter granted by the legislature, and the organization of a corporation under the general law; and that, while in the former case the charter is conclusive evidence against all persons dealing with the corporation formed under it, yet, where the organization is effected under the general law, while it is binding upon the members, the creditors of such corporation are not precluded from showing fraud, in order to set aside the immunity which a charter *fairly* obtained is intended to furnish.<sup>3</sup> But where a special charter is granted by the legislature, the fact that it was obtained by false or fraudulent representations to the legislature cannot avail as a defence to an action brought by it.<sup>4</sup> Until the State sees fit to interfere, the charter is a subsisting one, and such fraud is not a defence even in an action to recover the amount of a subscription to the stock.<sup>5</sup> In order to

36; *Swartwout v. Michigan, &c. R. R. Co.*, 24 Mich. 389; *Frost v. Frostburg Coal Co.*, 24 How. (U. S.) 278; *South Meadow Dam Co. v. Gray*, 30 Me. 547; *Cayuga Lake Co. v. Kyle*, 64 N. Y. 185; *Eakright v. Logansport, &c. R. R. Co.*, 13 Ind. 404; *Buffalo, &c. R. R. Co. v. Cary*, 26 N. Y. 75.

<sup>1</sup> *Attorney-General v. R. R. Co.*, 35 Wis. 425; *Atlantic, &c. R. R. Co. v. St. Louis*, 66 Mo. 228; *Baltimore & Ohio R. R. Co. v. Marshall Co.*, 3 W. Va. 319; *McAuley v. Columbus, &c. R. R. Co.*, 83 Ill. 348; *In re N. Y. Elevated R. R. Co.*, 70 N. Y. 327.

<sup>2</sup> *Com. v. France*, 3 Brews. (Penn.) 148.

<sup>3</sup> *Paterson v. Arnold*, 45 Penn. St. 410.

<sup>4</sup> *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344. Nor can fraud or bad faith on the part of the promoters in the organization of the company, or in the procurement of the charter, be made the subject of inquiry collaterally. *Garrett v. Dillsburgh, &c. R. R. Co.*, 78 Penn. St. 465. Nor can it be shown, to defeat proceedings by a railroad company to take lands, that the incorporators procured the charter for private purposes merely, and were exercising the corporate

privileges in abuse of the law, or that there was no public necessity for the road. *Pamero v. Hazleton, &c. R. R. Co.*, 33 Ohio St. 429. In *Smith v. Mississippi, &c. R. R. Co.*, 14 Miss. 179, it was held that, in an action by a bank upon a note payable to itself, the defendant cannot be permitted to inquire into the organization of the bank. See also *State v. Fagan*, 22 La. An. 545, where it was held that the objection that parties acting under a charter granted by the State have not completed the works within the time specified in the law, cannot be urged by third persons in a suit brought by the State to restrain them from interfering with the grantees of the franchise. It can only be urged by the State, in a suit by the State to have the charter forfeited.

<sup>5</sup> *Smith v. Mississippi R. R. Co.*, 14 Miss. 179; *McConahy v. Turnpike Co.*, 1 Penn. 426; s. c. 16 S. & R. (Penn.) 140. A formal defect in the organization will not defeat an action brought by the corporation to recover in trespass for the wrongful taking of property out of its possession, *Perall & Brooks Paper Co. v. Willett*, 1 Robt. (N. Y.) 131; nor in an action upon a contract made with it. *Eagle Works v. Churchill*, 2 Bos. (N. Y.) 166.

amount to a defence, the defendant must show that a fraud was committed upon him;<sup>1</sup> and in the case last cited, proof that the organization was effected by fictitious subscriptions to a large part of the stock, of which the defendant was ignorant and by means of which he was defrauded, was held a sufficient defence to an action upon his subscription for stock. But in the case of *colorable* subscriptions, they are held to be binding upon the subscribers themselves, and also upon the other subscribers who, upon the final discovery of the fact, fail, within a reasonable time after the discovery of the fact, to take measures to stop the further proceedings of the corporation.<sup>2</sup> But neither fraud in the distribution of the stock, nor colorable subscriptions thereto, will defeat the legality of the organization, unless the thing is arrested *in limine*.<sup>3</sup> Nor will a court of equity interfere, even though a stockholder brings proceedings to arrest further action, if matters have proceeded so far before discovery of the fraud, that the parties liable to be injuriously affected thereby cannot be put *in statu quo*.<sup>4</sup> Where there is a corporation *de facto*, strict proof of the corporate character is dispensed with, and the validity of its existence can only be tested by the State.<sup>5</sup>

**SEC. 12. Formation of under general laws.**—In those States where railroad companies are authorized to be formed under the general laws, a literal compliance with the statute is not required, and it is sufficient if the *substantial* requisites are performed.<sup>6</sup> Thus, where the statute requires that an affidavit shall be attached to a certificate filed, of the payment “in good faith” of ten per cent of the capital, in cash, any affidavit setting forth that such payment has been made, but omitting the words “in good faith,” was held to amount to a substantial compliance with the statute, and sufficient,<sup>7</sup> and the conditions precedent provided in the statute have been complied with. But, until such conditions have been complied with, the

<sup>1</sup> *McConahy v. Turnpike Co.*, *ante*.

<sup>2</sup> *Walker v. Devereaux*, 4 Paige Ch. (N. Y.) 229.

<sup>3</sup> *Selma & Tennessee R. R. Co. v. Tipton*, 5 Ala. 787; *Hayne v. Beauchamp*, 13 Miss. 515; *Johnston v. S. W. R. R. Bank*, 3 Strobb. (S. C.) 263.

<sup>4</sup> *Walker v. Devereaux*, *ante*.

<sup>5</sup> *Jones v. Dana*, 24 Barb. (N. Y.) 395. The regularity of such an organization can only be questioned by *quo warranto*, *scire facias*, or other proper proceeding brought

by the State, *Thompson v. Candor*, 60 Ill. 214; *Truckee, &c. Turnpike Co. v. Campbell*, 44 Cal. 89; *People v. Chambers*, 42 id. 201; and this is held to be the case even though the act of incorporation is unconstitutional. *Commissioners v. Shields*, 62 Mo. 247.

<sup>6</sup> *People v. Stockton R. R. Co.*, 45 Cal. 306; *Harvey v. Lloyd*, 3 Penn. St. 331.

<sup>7</sup> *People v. Stockton, &c. R. R. Co.*, *ante*.

corporation has no legal existence;<sup>1</sup> and consequently, in the case of a railroad corporation, would have no authority to condemn lands for the purpose of constructing its roads,<sup>2</sup> nor would it be entitled to the protection against the consequences of its acts, necessary for the prosecution of its business, which would exist in the case of a railroad constructed by a legal corporation. If the statute expressly declares that the corporation shall exist when certain things have been done, the corporation is set on foot upon the completion of such requisites, although the statute in other respects has not been complied with; and if such requisites have not been complied with, the corporation is not set on foot, although all the other statutory requirements have been fulfilled.<sup>3</sup> The organization of a corporation is effected as soon as its first meeting has been held and the proper officers are elected.<sup>4</sup>

SEC. 13. *Franchise of — What is.* — The franchises of a railroad corporation, are embodied in *the right conferred by its charter, to do and perform certain acts, which, except for such grant, would be illegal.* Among these, is the right to form a corporation; the right to take lands for the construction of its road; the right to operate its road; and, generally, to perform the functions of a railroad corporation.<sup>5</sup> These franchises are derived exclusively from the charter or the statute under which they are formed, and may be classified as “prerogative” and “ordinary;” and the distinction between these classes is of the highest importance. “Prerogative” franchises are those which arise from a special grant, and cannot be legally exercised within the State, either by an individual or corporation, without such special authority, and consequently, such as can only be exercised within the jurisdiction conferring it; and of this character are those specifically named *supra* in this section. In the case of a railroad company, it may be said that power to exercise the right of eminent domain is a franchise, and this is so even though the right acquired

<sup>1</sup> *Utley v. Union Tool Co.*, 11 Gray (Mass.), 139.

<sup>2</sup> See chapter on “*EMINENT DOMAIN.*”

<sup>3</sup> *Merrick v. Reynolds Engine, &c. Co.*, 101 Mass. 381; *Hawes v. Anglo-Saxon Petroleum Co.*, 101 id. 385; *Utley v. Union Tool Co.*, 11 Gray (Mass.), 139.

<sup>4</sup> *Hawes v. Anglo-Saxon Petroleum Co.*, *ante*.

<sup>5</sup> *State v. Boston, &c. R. R. Co.*, 25 Vt. 433; *Chicago, &c. R. R. Co. v. Dunbar*, 95 Ill. 571; *Bank of Augusta v.*

*Earle*, 13 Pet. (U. S.) 519. “The term ‘franchise’” says BUTLER, J., in *Bridgeport v. N. Y. & New Haven R. R. Co.*, 36 Conn. 255, “has several significations, and there is some confusion in its use. The better opinion deduced from the authorities seems to be that *it consists of the entire privileges embraced in and constituting its grant*,” and does not embrace the property acquired by the exercise of the franchise, and has no assignable or marketable value. *Id.*

is merely a right to use the land in common with the public or some other corporation. It is not essential to a franchise, in its legal sense, that it should in all cases be exclusive. But it must exist by a title greater than that of a mere licensee of a municipal corporation,<sup>1</sup> as, in this country, corporate franchise can emanate only from the sovereign power. The term "franchise" is, in law, sometimes used to mean an *exclusive* right held by grant from the sovereign power, — such in its nature that the same right cannot be granted to another without an invasion of the franchise of the first grantee. The strictly legal signification of the word is not always confined to exclusive rights; but the term is used in law to designate powers and privileges which are not exclusive in their nature. The Supreme Court of the United States, speaking through TANEY, C. J., said: "Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, of common right."<sup>2</sup> The term, according to Blackstone, embraces in its legal meaning several kinds of rights, some exclusive and some not exclusive.<sup>3</sup> Kidd says: "A corporation is a political person capable of enjoying a variety of franchises." SPENCER, J., says: "If there are certain immunities and privileges in which the public have an interest, as contradistinguished from private rights, and which cannot be exercised without authority derived from the sovereign power, it would seem to me that such immunities and privileges must be franchises."<sup>4</sup> And so the supreme court of New York held in that case, unanimously, that the right of an insurance company to carry on banking business was a franchise, although the judges differed on the question whether the defendant in that case had lawful right to such franchise.<sup>5</sup>

The mere grant of the right to build a railroad between given termini creates no implied obligation by the State to not thereafter grant the right to build other railroads parallel with it between the same termini.<sup>6</sup> Nor does it imply an obligation on behalf of the

<sup>1</sup> Chicago, &c. R. R. Co. v. People, 73 Ill. 547.

<sup>2</sup> Bank of Augusta v. Earle, 13 Pet. (U. S.) 595.

<sup>3</sup> 2 Bl. Com. 21.

<sup>4</sup> People v. Ætna Ins. Co., 15 John. (N. Y.) 387.

<sup>5</sup> Chicago & Western Indiana Railroad Co. v. Dunbar, 95 Ill. 571.

<sup>6</sup> Charles River Bridge Co. v. Warren

Bridge Co., 11 Pet. (U. S.) 420; Hudson & Delaware Canal Co. v. New York & Erie R. Co., 9 Paige (N. Y.), 323; Illinois & Michigan Canal v. Chicago & R. I. R. Co., 14 Ill. 314. In East Tennessee, Virginia & Georgia Railroad Co., plaintiff in error v. Hamblin County, 102 U. S. 273, a decree in chancery ordered, in case another sale should not be made, that commissioners might sell "all the property

State that other railroads, with their tracks and switches, shall not thereafter be granted the right to cross the State in a different direction, and thus pass over its tracks and switches.<sup>1</sup> The public welfare especially requires that the business of carrying shall be open to competition as far as possible; and no monopoly in that regard, however limited the sphere of its operation, can be presumed to have been intended by the legislature in the enactment of the general law for the formation of railroad corporations.<sup>2</sup>

"Ordinary" franchises are such rights and privileges which, although conferred by the charter, are nevertheless common incidents of similar corporations, and may be exercised in any jurisdiction in which their exercise is not expressly prohibited,<sup>3</sup> and which may be exercised by individuals without any special grant of authority. Among these is the right to exercise corporate functions; to sue and be sued as such; to hold property as such; to be exempt from the individual debts of its stockholders; and to be solely liable for the debts and contracts of the corporation.<sup>4</sup> The corporation itself is not a franchise, but it is the *attributes* of the corporation which comprise the franchises thereof, its special powers and rights.<sup>5</sup> These definitions and distinctions have been referred to in this place, because their observation will become important in many instances in the progress of our work.

SEC. 14. **Domicile of: Residence, &c.** — The domicile of a corporation must necessarily be in the State under whose laws it was

and franchises of" a railroad company. M., for himself and others, made an offer for the railroad, in which he said, "I expect a full and perfect title to the road, including the State's interest, franchises and privileges." This proposition was accepted by the commissioners, and the sale, reported to the court, was confirmed by decree, which treated the sale as one of the "property and franchises" of the company, and directed the commissioners "in conformity with the previous decrees," to "make title to the purchasers according to the terms of the contract and former decrees of this court;" and it was held that the purchasers acquired title only to the property and franchises of the company, and that an immunity from taxation would not, under the rule in *Morgan v. Louisiana*, 93 U. S. 217, pass to the purchasers. The term "franchises" is not synonymous with

"rights, privileges, and franchises," "rights, powers, and privileges," and the like. This case is distinguishable from *Humphrey v. Pegues*, 16 Wall. (U. S.) 244, where it was held that an immunity from taxation did pass under a transfer of "all the powers, rights and privileges" of a railway corporation.

<sup>1</sup> *Chicago & Alton R. Co. v. Joliet, Lockport & Aurora Ry. Co.*, 105 Ill. 388.

<sup>2</sup> *Lake Shore v. Chicago*, 97 Ill. 506; *Central City v. Fort Clark*, 81 id. 253, distinguished; *Connecting Railroad v. Union, &c.*, 107 Ill. 84.

<sup>3</sup> *State v. Boston, Concord, & Montreal R. R. Co.*, 25 Vt. 433.

<sup>4</sup> *Morgan v. Louisiana*, 94 U. S. 217; *Atlantic, &c. R. R. Co. v. Georgia*, 98 U. S. 359.

<sup>5</sup> *Kyd on Corporations*, 15.

created, and this is treated as its location; and in the case of railroad corporations, unlike most business corporations, they are usually created by the laws of the State in which the road is built; and in any event, because they derive all their power to take lands, and all the privileges incident to the operation of the roads, from the laws of such State, and therefore owe allegiance thereto, they are subject to such restrictions and conditions as it may impose. In other words, they are treated, for all purposes of jurisdiction, as citizens of the State under whose laws they were organized.<sup>1</sup> If they were created by the concurrent action of two or more States, their domicile is in each, although the principal office is only maintained in one of them; and their meetings may be held in either.<sup>2</sup> A corporation, like individuals, may have a domicile in one State and a residence in another. Its domicile, as we have seen, is in the State creating it, but its residence is in the place where its principal office is located and its principal operations are conducted, and may be in a foreign State, as well as in the State to which it owes its corporate life.<sup>3</sup> In an

<sup>1</sup> *Minot v. Philadelphia R. R. Co.*, 2 Abb. (U. S. C. C.) 323; *Pomeroy v. N. Y., &c. R. R. Co.*, 4 Blatchf. (U. S. C. C.) 120; *Baltimore, &c. R. R. Co. v. Glenn*, 28 Md. 287; *Hatch v. Chicago, &c. R. R. Co.*, 6 id. 105. And the same rule prevails as to *all* corporations. *New England Ins. Co. v. Detroit, &c. Co.*, 10 Am. Law Reg. N. S. 383; *Atkins v. Fibre Disintegrating Co.*, 7 Blatchf. (U. S. C. C.) 555; *Paul v. Virginia*, 8 Wall. (U. S.) 168.

<sup>2</sup> *Covington, &c. Bridge Co. v. Mayer*, 31 Ohio St. 317.

<sup>3</sup> *Louisville, &c. R. R. Co. v. Lettson*, 2 How. Pr. (N. Y.) 497; *N. Y. & Erie R. R. Co. v. Shepard*, 5 McLean (U. S. C. C.), 455; *King v. Gardner*, Cowp. 70; *Thom v. N. Y. Central R. R. Co.*, 26 N. J. L. 121; *Androscooggin, &c. R. R. Co. v. Stevens*, 17 Me. 434. A foreign corporation doing business in Rhode Island has only such powers as have been conferred upon it by its charter or by the laws of the State to which it owes its existence. It gains no additional powers by doing business here, because this State does not give it any, but only allows it, as a matter of comity, to exercise such as it has. Consequently, an assignment for creditors made in Rhode Island would have no va-

lidity under the laws of this State when made by a New York corporation, the laws of that State prohibiting such an assignment by a corporation. *Pierce v. Crompton*, 13 R. I. 64. The Maryland legislature having required every foreign insurance company doing business in that State to execute a power of attorney appointing an agent upon whom process might be served, to have the same effect as if served on the company, and by the act defining "process" to be any writ issued upon any action by any court, *held*, that a foreign insurance company, having executed such a power of attorney, has agreed to be "found" in the State as fully as if it were a domestic corporation; and that service of process of the United States Circuit Court on such an agent is valid, notwithstanding the suit may be upon a cause of action of which the State courts could not take jurisdiction, because of an act of the legislature restricting their jurisdiction, in suits against foreign corporations, to cases where the plaintiff is a citizen or the cause of action has arisen within the State. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 407; *Ex parte Schollenberger*, 96 U. S. 360; *Myer v. Insurance Co.*, 40 Md. 601; *Cromwell v. Insurance Co.*, 49 id. 382; *Merchants' Mfg. Co. v. Grand Trunk R. Co.*,



English case *WILDE, B.*<sup>1</sup> said, "The 'home' of a corporation must be taken to be that place which is occupied as such,—where their profits come home to them, whence orders emanate, and where the chief officers of the company are to be found." In other words, *where its principal office is located*. Especially is this the case for the purpose of ascertaining the jurisdiction of courts in actions for or against it, and the residence of its members has no bearing upon this question. But in most of the States, as to railroad corporations, it is held that they are, for many purposes, to be regarded as constructively residents of each county, city or town through which the road passes.<sup>2</sup> But for ordinary purposes they are treated as having

13 Fed. Rep. (U. S.) 358; *Mohr v. Insurance Co.*, 12 id. 474; *Brownell v. Troy & Boston R. Co.*, 3 id. 761; *Moch v. Virginia Fire Ins. Co.*, 10 id. 700; *Grover v. American Ex. Co.*, 11 id. 386; *Carstairs v. Mechanics' & Traders' Insurance Co.*, 13 Fed. Rep. 484. A foreign corporation, that by the laws of a State within which it comes on business can sue and be sued, is not a non-resident in the sense that would prevent it from setting up the statute of limitations as a defence in an action against it. See *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 588; *Ohio & Miss. R. Co. v. Wheeler*, 1 Black (U. S.), 295; *Runyan v. Coster's Lessee*, 14 Pet. (U. S.) 129; *Louisville, C. & C. R. Co. v. Letson*, 2 How. (U. S.) 497; *Covington Drawbridge Co. v. Shepherd*, 20 id. 227, 233; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Pennsylvania Co. v. Sloan*, 1 Bradw. (Ill.) 364; *Bristol v. Chicago & Alt. R. Co.*, 15 Ill. 436; *Penley v. Waterhouse*, 1 Iowa, 498; *Savage v. Scott*, 45 id. 132; *McCabe v. Illinois Central Railroad Co.*, 13 Fed. Rep. 489. A New York joint-stock company possessing the right, by the law under which it was organized, to sue and be sued in the name of its president or treasurer, is a citizen of the State of New York in the same sense that corporations are citizens of the States under whose laws they are organized; and such joint-stock company may, by the comity of States, sue and be sued in the name of such officer in the Federal courts as a citizen of New York, even though shareholders of such joint-stock company are citizens of the same State as the adverse party to the suit. In determining

what such joint-stock companies are, regard is to be had to their essential attributes rather than to any mere name by which they may be known. If the essential franchises of a corporation are conferred upon a joint-stock company, it is none the less a corporation because the statute calls it something else, or even designates it as an "unincorporated association." *Fargo v. Louisville, New Albany & Chicago Railway Co.*, 6 Fed. Rep. 84.

<sup>1</sup> *Adams v. Great Western Railway Co.*, 6 H. & N. 404. See also remarks of *MARTIN, B.*

<sup>2</sup> *Glaize v. South Carolina R. R. Co.*, 1 Strobb. (S. C.) L. 70; *Baldwin v. Mississippi, &c. R. R. Co.*, 5 Iowa, 518; *Richardson v. Burlington, &c. R. R. Co.*, 8 id. 260; *People v. Fredericks*, 48 Barb. (N. Y.) 173. A railroad company is not to be treated as a non-resident of a county through which its road passes, so as to be sued by short summons. *Belden v. N. Y. & Harlem R. R. Co.*, 15 How. Pr. (N. Y.) 17; nor can they be taxed as non-residents. *People v. Fredericks, ante*. So they are treated as residents of such counties to the extent that they may sue or be sued in any of them. *Baldwin v. Mississippi, &c. R. R. Co., ante*. In *Pond v. Hudson River R. R. Co.*, 17 How. Pr. (N. Y.) 543, it was held that a corporation having several places of business may be deemed a resident of each; but the doctrine of this case conflicts with that of *Hubbard v. National Protection Co.*, 11 id. 149, and is sustainable only in exceptional instances.

their residence only in the place where their principal office is located, and their principal business is transacted;<sup>1</sup> and a contrary doctrine would result in serious inconvenience, if not disaster, to the interests of a corporation. It is well established that when a corporation owning a road which runs through several States is chartered by each of them, it is by a useful fiction to be considered, for purposes of jurisdiction, a citizen of each of the States; and where such a corporation is sued in one of the States in which it holds a charter, as a citizen of that State, it cannot set up that it is likewise a citizen of another.<sup>2</sup> The fiction that makes two or three corporations out of what is in fact one, is established for the purpose of giving each State its legitimate control over the charters which it grants; but the acts and neglects of the corporation are done by it as a whole.<sup>3</sup>

When a foreign corporation avails itself of the privileges of doing business in a State whose laws authorized it to be sued there by service of process upon an agent, its assent to that mode of service is implied; and it consents to be amenable to suit by such mode of service as the laws of the State provide, when it invokes the comity of the State for the transaction of its affairs; and waives the right to object to the mode of service of process which the State laws authorize.<sup>4</sup> Indeed a corporation is, for jurisdictional purposes, to be regarded as a citizen of the State under the laws of which it is organized. Where, by the local law, a foreign corporation is amenable to suit in the courts of the State, service being made upon an agent within the State, the Federal courts may be regarded as courts of

<sup>1</sup> *Adams v. Great Western Railway Co.*, 6 H. & N. 404; *Androscoggin, &c. R. R. Co. v. Stevens*, 17 Me. 434; *Thorn v. Central R. R. Co.*, *ante*; *Hubbard v. National Protection Ins. Co.*, 11 How. Pr. (N. Y.) 149. A corporation having a principal office in a State is a resident of the place where such office is located, and the circumstance that it has secondary offices in other parts of the State does not change the rule. *Hubbard v. National Protection Ins. Co.*, *ante*.

<sup>2</sup> *Ohio, &c., R. Co. v. Wheeler*, 1 Black (U. S.), 286; *Railroad Co. v. Kroutz*, 104 U. S. 5; *Missouri, &c. R. Co. v. Texas, &c. R. Co.*, 10 Fed. Rep. 497; *Callahan v. Louisville, &c. R. Co.*, 11 id. 536.

<sup>3</sup> *Railway Co. v. Whitton*, 13 Wall. 270; *Home v. Boston & Maine Railway*

*Co.*, 18 Fed. Rep. 140. Opinion by LOWELL, J.

<sup>4</sup> *Railway Co. v. Whitton*, 13 Wall. (U. S.) 286; *Payne v. Hook*, 7 id. 427; *The Moses Taylor*, 4 id. 411; *Insurance Co. v. Morse*, 20 id. 445; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65; *Ex parte Schollenberger*, 96 U. S. 369; *Moulin v. Insurance Co.* 25 N. J. L., 57; *Bushel v. Commonwealth Ins. Co.*, 15 Sg. & R. (Penn.) 176; *Libbey v. Hodgdon*, 9 N. H. 394; *St. Louis Ins. Co. v. Cohen*, 9 Mo. 422; *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 93; *Newby v. Van Oppen*, 41 L. J. Q. B. 148; *Moch v. Virginia Fire Ins. Co.*, 10 Fed. Rep. 386; *Merchants' Mfg. Co. v. Grand Trunk Railway Co.*, 13 Fed. Rep. 86.

the State, and may take jurisdiction upon such service as would be good in a State court.<sup>1</sup> A Federal court has no jurisdiction over a foreign corporation, in the absence of local law conferring jurisdiction on the State courts, though the corporation does business through an agent, and has an office within the district where the court is held.<sup>2</sup> It is always a question of legislative intent whether the legislature of a State has adopted as its own a corporation of another State, or merely licensed it to do business in the State. If, however, the effect of the legislation be to adopt the corporation, it becomes, for the purposes of jurisdiction, a corporation created by the State adopting it.<sup>3</sup>

Corporations are not treated as *citizens*, according to the general sense in which such term is employed, and it has been held that they are not to be treated as such under that clause in the constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."<sup>4</sup> They are, however, for most purposes treated as *persons*, and as such are entitled to the rights and remedies conferred upon "persons" by statute, if they come within the equities of such statute.<sup>5</sup> Thus they are deemed "persons" under a statute imposing taxes upon

<sup>1</sup> *Railroad Co. v. Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369; *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 93; *Runkle v. Insurance Co.*, 2 id. 9; *Brownell v. R. Co.*, 3 id. 761; *Williams v. Transp. Co.*, 14 Off. Gaz. 523; *Wilson Pack. Co. v. Hunter*, 7 Reporter (Boston), 455.

<sup>2</sup> *Eaton v. St. Louis Shakspear Mining and Smelting Co.*, 6 Fed. Rep. 138.

<sup>3</sup> *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65; *Railroad Co. v. Wheeler*, 1 Black (U. S.), 286; *Railway Co. v. Whitton*, 13 Wall. (U. S.) 270; *Muller v. Dows*, 94 U. S. 444; *Ex parte Schollenberger*, 96 id. 369; *Railroad v. Vance*, id. 450; *Williams v. Railroad Co.*, 3 Dill. (U. S.) 267; *Wilson Co. v. Hunter*, 11 Chi. L. N. 267. The incorporators of a Kentucky corporation are conclusively presumed to be citizens of that State; and, therefore, a suit commenced in the State court by a citizen of Kentucky against a corporation chartered as a single consolidated company by the several States, including Kentucky, through which it operates a railroad, cannot be removed to the Federal court, as a

controversy between citizens of different States. *Railroad Co. v. Letson*, 2 How. (U. S.) 497; *Marshall v. Railroad Co.*, 16 How. (U. S.) 314; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Whitney v. Baltimore*, 1 Hughes (U. S. C. C.), 90; *Up-hoff v. Chicago, St. Louis, & New Orleans Railroad Co.*, 5 Fed. Rep. 96.

<sup>4</sup> *Paul v. Virginia*, *ante*.

<sup>5</sup> *Lehigh Bridge Co. v. Lehigh Coal, &c. Co.*, 4 Rawle (Penn.), 9; *Boyd v. Craydon Railway Co.*, 4 Bing. N. C. 669; *Mott v. Hicks*, 1 Cow. (N. Y.) 513; *State of Indiana v. Worum*, 6 Hill (N. Y.), 33; *State v. Nashville University*, 4 Humph. (Tenn.) 157; *Cortes v. Kent Water Works Co.*, 7 B. & C. 314; *Field v. N. Y. Central R. R. Co.*, 29 Barb. (N. Y.) 176; *Wright v. N. Y. Central R. R. Co.*, 28 id. 80; *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210; *Mineral Paint R. R. Co. v. Keep*, 22 Ill. 9; *Queen v. Middletown Mfg. Co.*, 16 John. (N. Y.) 5; *La Forge v. Exchange Ins. Co.*, 22 N. Y. 352.

"persons."<sup>1</sup> So within statutes relating to usury,<sup>2</sup> of limitations,<sup>3</sup> and penal statutes;<sup>4</sup> and generally it may be said that they are treated as persons under all statutes, except when, from the sense in which the term is used, it is evident that it was not intended to apply to them.<sup>5</sup> Strictly speaking, a corporation has no legal existence outside the State creating it; but by courtesy they are permitted to discharge their functions in other States, subject, however, to such reasonable restrictions as such sovereignty may see fit to impose.<sup>6</sup> In the case of a railroad corporation whose road extends through two or more States, although incorporated and known in both by the same name, and operated by one set of officers, as it owes its corporate existence to, and exercises its franchises in each State, *it is in each State a separate corporation*, a legal entity, so to speak, and subject to the legislative control of each State, to the extent that its road exists in each State, although the same corporators may compose both entities.<sup>7</sup> In other words, *it is a separate*

<sup>1</sup> Clinton Mfg. Co. v. Morse, cited in People v. Utica Ins. Co., 15 John. (N. Y.) 358.

<sup>2</sup> Thornton v. Bank of Washington, 3 Pet. (U. S.) 36; Grand Gulf Bank v. Archer, 16 Miss. 151; Commercial Bank v. Nolan, 7 How. (U. S.) 508.

<sup>3</sup> Olcott v. Tioga R. R. Co., *ante*.

<sup>4</sup> United States v. Smedey, 11 Wheat. (U. S.) 392.

<sup>5</sup> Com. v. Phenix Bank, 11 Met. (Mass.) 129.

<sup>6</sup> N. O. J. & G. N. R. R. Co. v. Wallace, 50 Miss. 244; County of Alleghany v. Cleveland, &c. R. R. Co., 51 Penn. St. 228; Ohio & Miss. R. R. Co. v. Wheeler, 1 Black (U. S.), 286; Day v. Newark Rubber Co., 1 Blatchf. (U. S. C. C.) 628; Union Branch R. R. Co. v. East Tenn., &c. R. R. Co., 14 Ga. 327; State v. Northern Central R. R. Co., 18 Md. 193; Sprague v. Hartford, &c. R. R. Co., 5 R. I. 233; Bishop v. Brainerd, 28 Conn. 289.

<sup>7</sup> Ohio, &c. R. R. Co. v. Wheeler, 1 Black (U. S.), 286. In an Indiana case, Aspinwall v. Ohio, &c. R. R. Co., 20 Ind. 492, it was held that the mere circumstance that the legislature gave authority to a railroad corporation established by it to own and manage a certain railroad in Ohio, did not warrant a change of domicile, and that the circumstance that the legis-

lature of Ohio had given it authority to act therein, did not change the rule; and that where such corporation, after its stock had been subscribed for in Indiana, migrated to Ohio, and there established its principal office, and there issued a call for instalments due upon such subscriptions, payable at its office in Ohio, it was held that such subscriptions could not be collected, because such corporate acts exercised in Ohio were inoperative and void. See, also, McCord v. Aspinwall, 20 Ind. 498; Aspinwall v. Somes, 20 id. 498. In Memphis, &c. R. R. Co. v. State of Alabama, U. S. Sup. Ct., March 30, 1883, it appeared that the Memphis & Charleston Railroad Co. was made by the statutes of Alabama an Alabama corporation, and also previously incorporated in Tennessee. It was held that these facts were not sufficient to uphold a motion to remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of Alabama; because, being a corporation of the State of Alabama, it has no existence in that State as a legal entity or person, except under and by force of its incorporation by that State; and although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts

*corporation in each State, and subject to the laws of each State within the respective jurisdictions, however those laws may conflict as to the operation of the road ;<sup>1</sup> and it is not believed that the several States*

of the United States. *Ohio & Mississippi R. Co. v. Wheeler*, 1 Black (U. S.), 286; *Railway Co. v. Whitton*, 13 Wall. (U. S.) 270. In an action between a citizen of the State of Nebraska and a railroad company, which, originally incorporated under the laws of the State of Iowa, had extended its road into the State of Nebraska, had filed a copy of its original articles of incorporation with the State secretary, and in other respects had complied with the State laws governing such companies, held, on a plea to the jurisdiction of the court, that under the laws of the State of Nebraska the company had become a domestic corporation, and that service upon the managing agent of the company for the State of Nebraska is not sufficient service on the Iowa corporation, though the line through both States is under one management, one set of officers, one board of directors, one set of stockholders; though the general offices are in Iowa; and though the agent makes his reports to the general offices. *Connolly v. Taylor*, 2 Pet. (U. S.) 556; *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65; *Ex parte Schollenberger*, 96 U. S. 369; *Knott v. Insurance Co.*, 2 Woods (U. S.), 479; *Stout v. Sioux City & Pacific Railroad Co.*, 8 Fed. Rep. 71.

<sup>1</sup> *State v. Northern Central Railway Co.*, 18 Md. 193; *Sprague v. Hartford, &c. R. R. Co.*, 5 R. I. 233; *County of Alleghany v. Cleveland, &c. R. R. Co.*, 51 Penn. St. 228. In *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black (U. S.), 286, it appeared that the plaintiff was incorporated in the States of Ohio and Indiana under the same name and for the same purposes, and that the defendant, a citizen of Indiana, subscribed for a portion of the stock of the road. The plaintiff had its principal office in the State of Ohio, and brought an action against the defendant in the Circuit Court of the United States to recover the amount of his subscription, claiming that such court had jurisdiction by reason of its being a citizen of Ohio. The defendant pleads to the jurisdiction, that at the time of his subscription, and

ever since, he was a citizen of Indiana, and that the plaintiff's road was constructed in that State under the authority of the legislature of Indiana. The court held that the Circuit Court had no jurisdiction, upon the ground that a corporation is a citizen only of the State by which it is created, and that, in the case of a corporation established by the concurrent action of two States, and carrying on its business in both, cannot have one and the same legal existence in both, but has a separate existence in each, and therefore is a citizen of each, and therefore could not unite as plaintiffs in a suit in the courts of the United States against a citizen of either of those States. *TANEY, C. J.*, in delivering the opinion of the court, said, after referring to numerous decisions of the court in previous cases: "It follows from these decisions that this suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it. . . . It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States. *Yet it has no legal existence in either State except by the laws of the State;* and neither State could confer upon it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may indeed be composed of, and represent under the corporate name, the same natural persons. *But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life, and endues it with its faculties and powers.*" In the *County of Alleghany v. The Cleveland, &c. R. R. Co.*, 51 Penn. St. 228, the defendant company was created by the laws of Ohio to construct a railroad therein, and subsequently was authorized by the State of Pennsylvania to extend its

could, if they would, abandon their jurisdiction and control over that portion of the road erected within its limits, by a corporation deriving its existence, powers, and privileges from its laws; but it might, undoubtedly, authorize such corporation to establish its principal office, and exercise its corporate functions in another State, as it would, in the case of long lines of railways extending through several States, under one management, be impracticable for the corporation to maintain a principal office in each State;<sup>1</sup> and the maintenance of such principal office outside the limits of the State, does not interfere with the jurisdiction or control of each State, over that portion of the road existing within its borders. But where a railroad corporation is created by the laws of one State, with authority to construct a railroad within its borders, and into or through another State, while the act creating the corporation is operative to give it vitality and corporate power, yet it does not, of course, give it any authority to take lands, etc., in such other State for the construction of its road; *yet, if such other State recognizes it as a corporation, and to further its objects, confers upon it the necessary authority*

road into that State. The action having been brought in a State court of Pennsylvania, the defendant petitioned for a removal of the cause into the United States courts, upon the ground that, as it was created and had its principal office in Ohio, it was a citizen of Ohio, while the plaintiff was a citizen of Pennsylvania. The petition was denied, the court holding, upon the authority of *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black (U. S.), 286, that, as the corporation was created by the concurrent action of two States, it must be treated as a citizen of both States, or rather as a separate corporation in each State, and consequently that an action could not be brought by a citizen of Pennsylvania against it in the United States court. See, also, to the same effect, *Baltimore, &c. R. R. Co. v. Wightman*, 29 Gratt. (Va.) 431; *McGregor v. Erie R. R. Co.*, 35 N. J. L. 115; But see *Railway v. Stringer*, 32 Ohio St. 468; and *Baltimore, &c. R. R. Co. v. Cary*, 28 id. 208, where it was held that when a foreign corporation leases the railroad of a domestic corporation, it does not thereby lose its character as a foreign corporation; and in an action against it for an injury inflicted by it upon a citizen of Ohio, upon

the road lying in Ohio, it is entitled to have the action removed into the United States court. In *Covington, &c. Bridge Co. v. Mayer*, 31 Ohio St. 317, the bridge company was chartered by the States of Ohio and Kentucky to erect a bridge across the river to connect the two States. It was originally incorporated by the legislature of Kentucky, and subsequently the legislature of Ohio, by an act for that purpose, after reciting *in extenso* the Kentucky act creating the corporation, declared that "the corporation thereby created shall be, and the same is made, a body corporate and politic of this State, with the same franchises, rights, and privileges, and subject to the same duties and liabilities, as are specified in the above recited act," &c. In an action to test the validity of a tax assessed upon one-half of its capital stock paid in, under a statute of Ohio, it was held that the corporation must be treated as a single corporation, clothed with the powers of two corporations, and had its domicile in both States, so that meetings held in either were legal.

<sup>1</sup> See remarks of Hovey, J., in *Mead v. Housatonic R. R. Co.*, 45 Conn. 224; *Aspinwall v. Ohio, &c. R. R. Co.*, *ante*.

*to take lands, etc., for the construction of its road, without attempting to re-incorporate it in such State, it does not thereby become a new corporation in such State, but is a domestic corporation in the State creating it, and a foreign corporation in the other State, which has not endowed it with corporate life, but merely conferred upon it authority to exercise its corporate functions, with which it was previously invested, within its jurisdiction. But the grant of such authority to a foreign corporation does not transfer the control over the property acquired by it to the foreign State, to the exclusion of the State granting such authority, but the latter State still retains jurisdiction and control over the same,<sup>1</sup> at least, to the extent necessary to preserve the rights of the State, and of its citizens, in the property.<sup>2</sup> Indeed the action of the State in such cases may be said to amount merely to a license to such foreign corporation to take property for its corporate purposes, and to exercise its corporate functions within the State, and, unless a definite time is fixed upon, there can be no question but that it may revoke such license at any time. And, even though a definite term within which such rights may be exercised is fixed upon in the act conferring authority, yet, as the State does not thereby surrender its jurisdiction over the property, there can be no question but that it may revoke such license at any time within the term named, if such corporation exercises such authority in a manner inconsistent with its corporate powers, or not fairly within the scope of the authority granted.<sup>3</sup> That one State may permit a corporation created in another State or country, to exercise its functions therein, and may impose certain restrictions as a condition precedent thereto, is well settled. But such corporation, by accepting such conditions, does not become a new corporation in such State, but remains a domestic corporation of the State creating it, and a foreign corporation in the State under whose license it acts; and it is subject to the laws of each State, however diverse they may be. This is well illustrated by the legislation in reference to insurance companies. They are admitted into different States to do business upon certain conditions, and whenever they fail to comply with such conditions the State may revoke their license, and from*

<sup>1</sup> *Eaton & H. R. R. Co. v. Hunt*, 20 Ind. 457. *Muller v. Dows*, 94 U. S. 444. See *post*, chapter on "CONSOLIDATION;" also

<sup>2</sup> *Mead v. Housatonic R. R. Co.*, 45 Conn. 199; *McElrath v. Pittsburgh, &c. R. R. Co.*, 55 Penn. St. 189; *Hand v. Savannah, &c. R. R. Co.*, 12 S. C. 314; "MORTGAGES."

<sup>3</sup> See *post*, chapter on "STATE CONTROL."

that time their right to transact business therein is gone, notwithstanding they may have erected expensive buildings therein, in which to transact their business, and made other heavy expenditures upon the faith of such license. The withdrawal of such license does not impair the corporate powers of such companies, but simply prevents them from doing business in the State which has withdrawn their authority; and the same rule, under similar circumstances, would prevail as to all foreign corporations, for whatever purpose established.<sup>1</sup>

<sup>1</sup> *Baltimore, &c. R. R. Co. v. Glenn*, 28 Md. 287; *Weymouth v. Washington, &c. R. R. Co.*, 1 McArthur (U. S. C. C.), 19. Corporations are the creatures of local law, and have no claim to recognition beyond the jurisdiction creating them; therefore, as compensation for recognition elsewhere, they are amenable to such terms as other States may impose. *Paul v. Virginia*, 8 Wall. (U. S.) 168; *State v. Fostick*, 21 La. An. 434; *Phenix Ins. Co. v. Com.*, 5 Bush (Ky.), 68; *Home Ins. Co. v. Davis*, 29 Mich. 238; *Wood Mowing, &c. Co. v. Caldwell*, 54 Ind. 270; *Liverpool, &c. Ins. Co. v. Mass.*, 10 Wall. (U. S.) 566; *Land Grant R. R. Co. v. Coffey Co.*, 6 Kan. 245; *Ducat v. Chicago*, 48 Ill. 172; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Doyle v. Continental Ins. Co.*, 94 U. S. 585; *Williams v. Creswell*, 15 Miss. 817; *Hadley v. Freedman's Savings Bank*, 2 Tenn. Ch.

122; *Lamb v. Lamb*, 13 Bankr. Reg. 17; *Ins. Co. v. Morse*, 20 Wall. (U. S.) 445. When a corporation created by the laws of one State comes, by its officers, within the jurisdiction of another, and there engages in business or undertakes to act, it becomes amenable to the laws of the latter State, and to the process of its courts, upon the same principles and to the same extent that natural persons or companies incorporated by such latter State would be. If such a corporation is guilty of a wrong, or commits a trespass, within the latter State, it cannot escape the consequences of its illegal acts by setting up its existence under a foreign government. *Austin v. N. Y. & Erie R. R. Co.*, 25 N. J. L. 381; *People v. Central R. R. Co. of New Jersey*, 48 Barb. (N. Y.) 478; *Warren Mfg. Co. v. Etna Ins. Co.*, 2 Paine (U. S. C. C.), 501.



## CHAPTER II.

## CAPITAL STOCK — WHAT IS : SUBSCRIPTIONS TO, BY INDIVIDUALS.

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| <p>SEC. 15. Meaning of the term.</p> <p>16. Commissioners to take Subscriptions : Powers of.</p> <p>17. Subscriptions to, by individuals.</p> <p>18. How may be made.</p> <p>19. Form of.</p> <p>20. Effect of Subscription : Taking Stock at less than par.</p> <p>21. Subscription does not amount to membership, unless.</p> <p>22. Conditions in Charter.</p> <p>23. Subscriber cannot be released by Corporation.</p> <p>24. Contract is several.</p> <p>25. Agreement to Subscribe.</p> <p>26. Agreement to take and fill.</p> <p>27. Colorable Subscriptions.</p> <p>28. Absolute Subscriptions.</p> <p>29. Conditional Subscriptions.</p> <p>30. Kind of Conditions which may be imposed.</p> <p>31. Condition as to Location.</p> <p>32. Condition as to Time.</p> <p>33. Construction of Conditions.</p> <p>34. Waiver of Conditions.</p> <p>35. Defences to Actions for Subscriptions : Change in Charter.</p> <p>36. When Consent of all to the Change is Necessary.</p> <p>37. Subscriber's assent, effect of.</p> <p>38. Changes which do not affect Subscriber's liability.</p> | <p>SEC. 39. Amendments made under Reservation in Charter, &amp;c., effect of.</p> <p>40. No definite rule can be given: Principal Tests.</p> <p>41. Immaterial changes.</p> <p>42. Amendments not acted upon.</p> <p>43. Miscellaneous Grounds of Defence.</p> <p>44. Personal disadvantage to Subscriber — not enough.</p> <p>45. Irregularities in Formation and Action of the Corporation.</p> <p>46. Fraud as a Defence.</p> <p>47. Assignment, effect of.</p> <p>48. Assessments—How must be made.</p> <p>49. Power must be Exercised as Statute provides.</p> <p>50. Assessments by Instalments.</p> <p>51. When discretion is vested in Directors.</p> <p>52. Corporation-books Evidence of exercise of Discretion.</p> <p>53. Notice of Assessments or Calls.</p> <p>54. Sufficiency of.</p> <p>55. Payment — How may be made.</p> <p>56. Agreement with Subscribers for Stock at less than par value. — Invalid when.</p> <p>57. Paid-up Shares.</p> <p>58. Right of the Consolidated Company to make Calls.</p> <p>59. Remedy against Subscribers.</p> |
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SEC. 15. **Meaning of the term.** — The capital of a corporation is commonly denominated its capital stock, from the circumstance that it is divided into shares, which represent the interest of each holder in the property of the corporation. When the term stock is used in reference to a corporation, it can refer to nothing else than the interest of the holders in the property of the corporation ;<sup>1</sup> and

<sup>1</sup> *People v. Commissioners of Texas*, 23 N. Y. 192 ; *Jones v. Terre Haute, &c. R. R. Co.*, 57 N. Y. 196. The word "stock" as used in reference to a corporation, when it means anything else than the capital of a corporation, can refer to

this includes not only the capital of the company, but all its profits and surplus, until it is separated from the capital, and a dividend is declared,<sup>1</sup> or, under the provisions of the charter or law under

nothing else than the interests of the shareholders or individuals. Such interests are called "stock;" and the sum total of them is appropriately enough called the stock of a corporation. The profits and surplus funds, whenever they may have accrued, are, until separated from the capital by the declaring of a dividend, a part of the stock itself, and will pass with the stock under that name in a transfer or bequest. *Phelps v. Farmers' & Mechanics' Bank*, 26 Conn. 269. If the charter of a corporation sets apart a fund as capital, out of which debts are to be paid, it amounts to a contract with those who become creditors on the faith of it, that the fund shall not be withdrawn and appropriated to the use of the owner or owners of the capital stock. *Curran v. Arkansas*, 15 How. (U. S.) 304; *Wood v. Dummer*, 3 Mas. (U. S. C. C.) 308.

<sup>1</sup> In *Phelps v. Farmers' & Mechanics' Bank*, 26 Conn. 269, the defendant's charter provided that in addition to their fixed capital the bank shall be open at all times for subscriptions from the funds of the State, the school funds, or the funds of any college, ecclesiastical society, school, or corporation for charitable purposes within the State, provided that the shares so subscribed shall not be transferable, but may at any time be withdrawn on twelve months' notice to the directors, and shall not exceed twenty-five per cent of the shares subscribed by individuals. Under these provisions, sundry charitable corporations subscribed from time to time for shares in the bank. In 1857, the bank having a surplus fund of about \$90,000, mostly earned before these subscriptions were made, declared from such fund a dividend of fifteen per cent, payable to this class of stockholders as well as the others. This action was brought to restrain the bank from paying the dividend to the charitable corporations. But the court refused the injunction and dismissed the bill, *ELLSWORTH, J.*, saying: "It is contended that when these corporate bodies subscribe under the 10th section of this charter (the provisions of

which are to be found in the bank charters generally), they hold their stock just like the other shareholders, and of course are entitled to share as others in all the dividends and property of the bank. We think this latter view is the correct one. The charter speaks of these subscriptions as 'shares of stock,' and for aught we see they are throughout placed on the same footing with other shares of stock, saving only that they may not be transferred, and may be withdrawn after notice, at par, so long as the bank is solvent. *The profits of a bank, no matter when made, until separated from the stock by declaring a dividend, are mere increment and augmentation of the stock.* They are properly stock themselves, composing a part of the stock of the bank, and will pass with the stock under that name, either by contract, bequest, or levy of execution. The impossibility of ascertaining the exact state and condition of the bank at the moment of subscribing (and subscriptions of this class are made, not at any fixed time, but at the pleasure of the party), is a weighty consideration why undeclared profits should be held to be a part of the stock itself. If a bank has a certain defined surplus, which has actually been separated and made distinct, and is so known and treated by contracting parties or by the statute, it is possible that it may, in that case, be held to possess a new character and be dealt with accordingly; but it must be a very peculiar case, differing essentially from what we have here. This \$90,000 had not been separated from the other profits, but was mixed indiscriminately with them, and was attached to and constituted a part of each share of the stock until the dividend of the 11th of May, 1857. The case in this court of the *United Society v. Eagle Bank*, 7 Conn. 456, is against the views of the petitioner. There the court held that the society by its subscription became a part of the corporation and held its shares like the other stockholders, and that its inability to transfer its stock, and its privilege to withdraw at par, made no differ-

which the corporation was created, it has been set apart as a fund out of which debts are to be paid; in which case such fund cannot be withdrawn and appropriated to the use of the owners of stock.<sup>1</sup>

The capital of a corporation is generally fixed in the charter, or in the articles of association when the company is formed under the general law, and includes only the amount to be raised by subscription;<sup>2</sup> and, unless authority is given in the charter or the general statute to do so, it can neither be increased nor diminished without the consent of the legislature.<sup>3</sup> But in most railway charters authority is given to increase the capital stock; or if the charter does not contain such a provision, it is given by general law. Strictly speaking, the capital of a corporation is the sum which the legislature has permitted the corporation to invest, primarily, in its business, or which the corporation has itself decided so to invest. This gross sum is divided into shares of an equal amount and value; and the interest which the holder of these shares acquires in the property of the corporation, is measured thereby.<sup>4</sup>

ence in its character as a stockholder. Indeed these qualifications pre-suppose that these corporate bodies are stockholders; for why else does the charter provide that they shall not transfer their stock, and may on notice withdraw it at par."

<sup>1</sup> *Curran v. Arkansas*, 15 How. (U. S.) 304; *Wood v. Dummer*, 3 Mas. (U. S.) 308; *Rand v. Hubbell*, 115 Mass. 461.

<sup>2</sup> *St. Louis, &c. R. R. Co. v. Loftin*, 30 Ark. 693; *The State v. Morristown Fire Association*, 23 N. J. L. 195. The amount of shares subscribed, and not the sum actually paid in, constitutes the capital of a corporation. *Hightower v. Thornton*, 8 Ga. 486; *State Bank v. Milwaukee*, 18 Wis. 281.

<sup>3</sup> *In re Ebbse Vale Steel, &c. Co.*, L. R. 4 Ch. D. 827.

<sup>4</sup> In *Connecticut (New Haven v. City Bank*, 31 Conn. 106) it is held that the capital of a bank embraces all its property, real or personal. In that case by the terms of the charter the capital stock was to consist of five thousand shares of one hundred dollars each. There was also a provision in its charter, that the corporation, as soon as it was organized, should subscribe one hundred thousand dollars, being one thousand shares to the capital stock of the Hampshire and Hampden Canal Co., and in consideration of such

subscription, which was duly made, that the capital stock of such bank should be exempt from taxation until the tolls collected by such canal company should be sufficient to pay a dividend of six per cent per annum, after which the stock of said bank should be liable to taxation the same as other bank stock. The canal company did not collect tolls to enable it to pay such a dividend, but the legislature subsequently passed a law providing that "the real estate belonging to any bank, *over and above* what may be required and used by such bank for the transaction of its appropriate business, shall be liable to be assessed and set in the list of such corporation in the town where such real estate is situated, and shall be liable to taxation to the same extent as if owned by individuals." The defendant bank, out of its capital stock, purchased a lot, and erected a building for its banking purposes, at a cost of \$28,000; and a portion of this building which was not needed or used for its banking purposes, was rented to other parties for other uses and purposes. The value of such portion of the building was assessed at \$6,000, and upon this sum a tax was assessed against the bank of the plaintiff. The defendant resisted the tax

For instance, if the capital is divided into shares of the nominal value of one hundred dollars, the interest of the holder of a single

upon the ground that its assessment was virtually an assessment upon its capital stock, and therefore a violation of the contract between it and the State; and the court sustained this view, holding that the capital stock of a bank embraces all its property, real or personal. In passing upon the question, SANFORD, J., said: "The absolute inviolability of the contract between the sovereign powers of the State and the City Bank, by which the former undertook that the 'capital stock' of the latter should be and forever remain free from taxation (until the happening of an event not yet arrived) is conceded. The only question between the parties is, what is 'the capital stock' thus exempted? The object for which a banking company is incorporated is well understood and needs no elucidation or remark. But in the solution of the question now submitted to us we may derive some assistance from the consideration that, although created for the purposes of trade, the corporation had originally nothing to trade in. All its property, its capital, its stock, was contributed by individual subscribers from their private funds, and was by them intrusted to its keeping and its management for their benefit, taking from it no tangible property in return, nothing but the evidence of their contributions and their consequent interest in the common fund or capital stock thus contributed. Originally then, 'the capital stock of the bank' was all the property of every kind, *everything which the bank possessed*. And this 'capital stock,' all of it, in reality belonged to the contributors, it being intrusted to the bank to be used and traded with for their exclusive benefit; and thus the bank became the agent of the contributors, so that the transmutation of the money originally advanced by the subscribers, into property of other kinds, though it altered the form of the investment, left its beneficial ownership unaffected; and every new acquisition of property, by exchange or otherwise, was an acquisition for the original subscribers or their representatives, their respective

interests in it all always continuing in the same proportion as in the aggregate capital originally advanced. So that, whether in the form of money, bills of exchange, or any other property in possession or in action into which the money originally contributed has been changed or which it has produced, all is, as the original contribution was, the capital stock of the bank, held as the original contribution was, for the exclusive benefit of the original contributors and those who represent them. The original contributors and those who represent them are the stockholders. Each one of them holds an undivided portion of the entire stock, and together they hold all the stock of the corporation. The stock certificate which each of them holds is the muniment of his title, specifying his proportion of interest in all the property of the corporation, and all these stock certificates together represent the entire property of the bank, in whatever form it may exist. By the terms of the charter the capital stock of the bank was to consist of five thousand shares, of one hundred dollars each. Had that amount been subscribed and at once paid in, the money so accumulated would have been the capital stock of the bank, and as such exempted from taxation. And when one hundred thousand dollars of the money thus accumulated had been paid out by the bank on its subscription for stock of the Hampshire and Hampden Canal Corporation, that canal stock took the place of the money paid for it, and became *pro tanto* capital stock of the City Bank, and exempt, as the money was, from taxation. And so, when afterwards, for debts previously contracted, houses, lands, or goods were necessarily taken in payment, such houses, lands or goods became, in lieu of the money for which they were received, part of the capital stock, and entitled to the same exemption. Otherwise the canal stock thus purchased, and the houses, lands, and goods thus acquired, might be taxed, and thus the promised exemption, purchased by the shareholders, and assured to them by the charter, would be rendered

share, in the entire property of the corporation, is as one hundred dollars is to the whole amount of the capital; and its *real* value is

worthless and delusive. We see no reason for a distinction in this respect between real estate so taken by the bank in payment of a debt, and the real estate which is the subject of this controversy. The right to erect a building, suitable and proper for the transaction in it of the business authorized by the legislature, is undeniable. The grant of a right carries with it as an incident the grant of suitable and proper means to enable the grantee to exercise that right and to reap and enjoy its fruits. And the case states that the building erected by the City Bank was a suitable and proper one for a banking house in that locality. It became as legitimately the property of the bank, legally acquired and held under the charter, as the houses and lands taken in payment of debts previously contracted. The entire cost of the building was paid, and properly paid, out of 'the capital stock' existing in the form of money, and thus the building became what the money paid for it was, capital stock in its stead. In putting on the second story of the building the directors may have made an unprofitable, or otherwise ill-advised investment of the stock; but of such investment, unless it was illegal, none but the stockholders can complain. And if the bank has violated its charter by investing a part of its capital in a way prohibited, it may be liable to the forfeiture of its franchises, but this is not the time or the place for the infliction of such a penalty. But the primary object of the bank in erecting the building was the accommodation of the proper business of the bank, and the temporary renting of the room was but an incident to the ownership, neither affecting the title to the property nor the right to hold it free from taxation. We are satisfied that the property in question is to be regarded as part of the capital stock of the corporation, and therefore exempted from taxation by the express provisions of the charter. We cannot, in the absence of explicit declarations to that effect, impute to the legislature an intention to provide merely that the shareholders should be indi-

dually exempt from taxation on account of their respective interests in the property of the bank, while it retained the power and right to assess and tax all or any portion of that property against the bank itself. Such reservation of right would render the promised exemption a worthless figment. But it is said there is an obvious distinction between the real property of a corporation and the shares of capital stock in the hands of its stockholders, and we may add that there is the same difference between the *personal* property of the corporation and its stock in the hands of the stockholders; but this consideration goes but a very little way, if at all, toward the solution of the question now before us. That question is, whether the promised exemption, which confessedly covers the intangible ideal rights called shares in the hands of the stockholders, covers also the property, real and personal, in which the whole value of those shares consists; whether it is possible to impose a tax upon the latter, without having the entire burden of the imposition fall upon the former; and if it is not, whether the construction contended for by the town can be the true construction of the grant. And for the purposes of this question, we can see no difference between the real and personal property held by the corporation. The shares of the capital stock cover and include them both. In regard to corporations whose stock is not by the terms of their charters exempt from taxation, the statute is imperative, that all real estate belonging to any bank or insurance company, or other private corporation, over and above what may be required and used by such bank, &c., for the transaction of its appropriate business, shall be liable to be assessed and set in the list of such corporation in the town where such real estate is situated, and shall be taxed to the same extent as if owned by an individual. But that statute in no manner affects corporations whose stock or property is by their charters exempted from taxation. An examination of the cases to which our attention was invited

measured, not necessarily by the capital of the corporation, but by the actual value of the property owned by the corporation.<sup>1</sup> That is, while the nominal value of a share of the stock of a corporation is one hundred dollars, its actual value is either more or less than that sum, according to the actual value of the property of the corporation, after deducting its debts. Consequently, while the capital of a corporation may be expressly fixed at a certain sum by the legislature, so that it can neither be increased nor diminished by the corporation without the consent of the legislature, yet the actual value of the property employed in the prosecution of its business may lawfully (in the absence of any express provision to the contrary) be largely in excess thereof; and the sum in excess of the capital, after the liquidation of its indebtedness, is treated as "surplus" capital, and proportionately increases the value of each share of the stock. In a New York case<sup>2</sup> it was held that a limit imposed upon the capital stock of a corporation does not operate as a limitation upon the amount of *property* which it may own, either real or personal, or of the amount of its liabilities or outstanding obligations. Such a limit is rather regarded as the sum upon which calls may be made upon subscribers, and upon which dividends are to be paid to the stockholders. Accordingly it was held that where the capital of a corporation was limited to one million of dollars, the company was not thereby restricted from expending *two* millions of dollars in their business, and from incurring debts on bond and mortgage for such excess. Strictly, for most purposes, especially for the purposes of taxation, the capital of a railroad corporation is the sum subscribed by stockholders, or which is to be so subscribed, and does not include the lands granted to it, either by a State or by Congress.<sup>3</sup>

by the counsel for the town, has failed to convince us of the incorrectness of the views above expressed. In no one of those cases has the precise question before us been decided, and in all of them the decisions seem to have been governed by some peculiar local statute and by considerations which we think inapplicable in the case before us." But in *State v. Morristown Fire Association*, 23 N. Y. L. 195; *State Bank v. Milwaukee*, 18 Wis. 281, a different view was adopted, and neither the property nor accrued profits were regarded as a part of the capital stock.

<sup>1</sup> *Jones v. Terre Haute, &c. R. R. Co.*, 57 N. Y. 196.

<sup>2</sup> *Barry v. Merchants' Exchange Co.*, 1 Sandf. (N. Y.) 280.

<sup>3</sup> *St. Louis, &c. R. R. Co. v. Loftin*, 30 Ark. 693; *Hightower v. Thornton*, 8 Ga. 486; *State v. Morristown Fire Association*, 23 N. Y. L. 195. The accumulated profits which have never been divided are not a part of its capital stock for the purposes of taxation, or of exemption from taxation. *State Bank v. Milwaukee*, 18 Wis. 281.

SEC. 16. **Commissioners to take Subscriptions: Powers of.**— It is often the case, especially where special charters are granted for the construction of a railroad, and the formation of a corporation for that purpose, that commissioners are appointed to open books and take subscriptions to the stock; and in such cases, the act of incorporation does not become operative until the subscribers to the stock are determined, and the commissioners have distributed it and decided who are to hold it.<sup>1</sup> The securing of the subscriptions is a ministerial act, and may be performed by an agent, but the *distribution* of the stock is a judicial act, and requires the commissioners to act in person; and the presence of the whole board is necessary, although the act of a majority is binding.<sup>2</sup>

The commissioners in receiving subscriptions do not act in the capacity of agents or trustees for the subscribers, but rather in that of public officers; and if they omit to open the books for receiving subscriptions, or to apportion the stock according to the requirements of the statute, they may be compelled to perform these duties by mandamus. If in the distribution of the stock it is assigned to any one not entitled to hold it, the apportionment is not void, but such subscriber will in equity be regarded as holding it in trust for all the subscribers or for the party entitled; and a party who claims to have been injured by a wrong distribution of stock, and who seeks redress, should file his bill in behalf of himself and of all others interested in the distribution, and should make all those to whom stock has been distributed defendants, so that the court can have all parties interested before them. The commissioners do not represent those parties to whom the stock has been distributed by them. The bill should also contain a prayer for a preliminary injunction, if that is desired. The complainant, by receiving his money deposited in payment of the first instalment, relinquishes all right to interfere in this mode.

If the commissioners have a discretion to distribute the stock as they deem most for the interests of the corporation, they are not obliged to give a portion to each subscriber. Thus, where a distribution is required to be made among all the subscribers, and no discretion is vested in the commissioners, it must be made among them all in proportion to their subscriptions. But if the person making

<sup>1</sup> Walker v. Devereux, 4 Paige Ch. White, 41 Me. 512, where a majority of the commissioners is held to be a competent quorum.

<sup>2</sup> Crocker v. Crane, 21 Wend. (N. Y.)

217. But see Penobscot, &c. R. R. Co. v.

the distribution has an arbitrary discretion in selecting the persons to whom the distribution shall be made, he may distribute it all to one or more, as he sees fit; and no court has any power to revise the exercise of such discretion, provided it is done in good faith. And, if there is nothing in the charter to the contrary, the commissioners may become subscribers and apportion shares to themselves. In cases where commissioners have such a discretion in the distribution of the stock, it is a fraud upon them and upon the law for persons to subscribe for stock in their own names, under a secret agreement to hold it in trust for others if stock should be apportioned to such subscribers, — this being done with the purpose of securing stock to such persons as the commissioners would not allow to hold it. Such a trust, being illegal, is void, and the subscriber acquires an absolute title to the stock assigned him as against the person for whose benefit he subscribed for it, and it is only by a bill brought against him directly that he can be compelled, if at all, to surrender the shares to the *bond fide* subscribers.<sup>1</sup> Where the statute makes it the duty of the commissioners to require the payment “in cash” of a certain per cent of the subscription, they have no authority to take “checks” or “notes” for the amount,<sup>2</sup> and if they do so, and the payment of such advance is a condition precedent, their acts invalidate the organization of the corporation.

The commissioners have no powers beyond those given them by statute; consequently it would seem that they have no authority to take conditional subscriptions, or in any event to make any representations or assurances as to the purposes of the corporation upon which a subscriber has a right to rely in making his subscription.<sup>3</sup>

**SEC. 17. Subscriptions to, by individuals: Consideration of Status of Subscribers.** — The contract of a subscriber for the stock of a railroad or other proposed corporation is subject to the same rules and principles as apply to other contracts, so far as relates to a consideration. The consideration for such a subscription may be said to be the agreement by the corporation to give him, for the money or other property subscribed, the shares stipulated for in the particular corporation, of the nominal value agreed for, and to carry out the

<sup>1</sup> Walker v. Devereux, *ante*.

<sup>2</sup> Crocker v. Crane, *ante*.

<sup>3</sup> Bedford R. R. Co. v. Bowser, 48 Penn. St. 29; Pittsburgh, &c. R. R. Co. v. Biggar, 34 id. 455; Babbington v. Pittsburgh, &c. R. R. Co., 34 id. 358. But holding that subscriptions may be received

by commissioners upon condition, see Evansville, &c. R. R. Co. v. Shearer, 10 Ind. 244; Jewett v. Lawrenceburgh, &c. R. R. Co., id. 539; Martin v. Pensacola, &c. R. R. Co., 8 Fla. 370; New Albany R. R. Co. v. McCormick, 10 Ind. 499.



enterprise so that it shall be *substantially* the same as that described in the subscription paper and documents referred to therein. The obligation to give the shares when the subscription is accepted, is concurrent with, and a consideration for, the subscriber's obligation to pay for them the sum subscribed.<sup>1</sup> The right and advantages of membership in a corporation are of themselves a sufficient consideration for a subscription to its stock.<sup>2</sup> No particular form is necessary, as, whatever may be the form or language of subscription, every person who, in any manner, becomes a subscriber for, or engages to take any portion of the stock, thereby impliedly assumes to pay for the same according to the conditions of the subscription paper and of the charter;<sup>3</sup> and an express promise to pay is not necessary. If the subscription itself does not specifically embrace the terms of the contract, a contract to take and pay for the stock is implied from the subscription.<sup>4</sup>

<sup>1</sup> *Parker v. Northern, &c. R. R. Co.*, 33 Mich. 23; *Mahan v. Wood*, 44 Cal. 462. The rights of the parties are concurrent and dependent. *St. Paul, &c. R. R. Co. v. Robbins*, 23 Minn. 489.

<sup>2</sup> *Lake Ontario R. R. Co. v. Mason*, 16 N. Y. 451; *Selma, &c. R. R. Co. v. Tip-ton*, 5 Ala. 587; *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 336; *Kennebec, &c. R. R. Co. v. Jarvis*, 34 Me. 366; *Thigpen v. Mississippi Central R. R. Co.*, 32 Miss. 348; *Birmingham, &c. R. R. Co. v. White*, 1 Q. B. 282; *East Tennessee, &c. R. R. Co. v. Gammon*, 5 Sneed (Tenn.), 567; *Hartford & New Haven R. R. Co. v. Kennedy*, 12 Conn. 499; *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 435.

<sup>3</sup> *Ogdensburg, &c. R. R. Co. v. Frost*, 21 Barb. (N. Y.) 541; *Buckfield Branch R. R. Co. v. Irish*, 39 Me. 44; *Danbury & Norwalk R. R. Co. v. Wilson*, 22 Conn. 435; *Small v. Herkimer Manufacturing Co.*, 2 N. Y. 330; *Kennebec, &c. R. R. Co. v. Palmer*, 34 Me. 364; *Hartford, &c. R. R. Co. v. Kennedy*, 12 Conn. 499; *Hartford, &c. R. R. Co. v. Crosswell*, 5 Hill (N. Y.), 383; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466; *Connecticut & Passumpsic River R. R. Co. v. Bailey*, 24 Vt. 465; *Lake Ontario, &c. R. R. Co. v. Mason*, 16 N. Y. 451; *Rensselaer, &c. R. R. Co. v. Barton*, 16 N. Y. 457; *Seymour v. Sturges*, 26 id. 134; *Burr v. Wilcox*, 22 id. 551; *Dutchess Cotton Co. v. Davis*, 14

*John. (N. Y.) 237*; *Pickering v. Templeton*, 2 Mo. App. 424; *Northern, &c. R. R. Co. v. Miller*, 10 Barb. (N. Y.) 266; *Berne v. Cahawba, &c. R. R. Co.*, 3 Ala. 666; *Brigham v. Mead*, 10 Allen (Mass.), 245; *Spear v. Crawford*, 14 Wend. (N. Y.) 20.

<sup>4</sup> *Fry v. Lexington & Big Sandy R. R. Co.*, 2 Met. (Ky.) 214. But in *Salem Mill Dam Co. v. Ropes*, 6 Pick. (Mass.) 25, it is held that a mere subscription for stock creates no promise, and gives no security to the corporation beyond the value of the stock; but a promise superadded gives a right of action, where there are parties in being to give and take the promise. This distinction is reasonable; for as the objects for which such corporations are applied for and granted are generally experimental, and as expenses must be incurred in trying the experiment, it is right and just that those who embark in the same cause should be holden to each other for a fair apportionment of the expenses; and it is not unjust, if a majority of those who associate should determine to complete the object, that those in whose promises they confide to bear their proportion of the expense, should be compelled to pay. But all such promises are in their nature conditional, and depend upon the terms on which they are made, with reference to the capacity, duties, and powers of the other party to the contract, the corporation; who cannot extend the effect of the prom-

It is only necessary, in the absence of any statutory requirement, that the subscription should embody *a complete contract on both sides*; <sup>1</sup> and, as is shown by the cases cited in the last note, if it fails to do this the subscription is not binding. But a contract may be made out in form from detached memoranda made by a person authorized to act for the subscribers in that respect, <sup>2</sup> and mere formal defects will not invalidate it; as, if the subscription to a railroad does not correctly describe the termini of the road as built. <sup>3</sup>

SEC. 18. **How may be made.** — In order to constitute a valid and binding subscription for stock, the contract must be in writing, as there can be no such thing as a *subscription* by parol. <sup>4</sup> But, even though the charter or statute provides that books for subscription shall be opened, the use of subscription *papers* instead of books does not invalidate the subscription; <sup>5</sup> and a subscription for stock, made in a small blank-book, before the stock-book for subscriptions was opened, and which was never entered in or regularly transferred to the stock-book, was held to be valid and binding. <sup>6</sup> If a subscription is in other respects unexceptionable, the fact that it was not made in a book opened by the company for that purpose, does not affect its validity *if it is accepted and acted upon by the company as a subscription*; <sup>7</sup> and no notice of its acceptance as such is neces-

ise beyond the original meaning and extent of it, any more than the other party can limit it. *Odd Fellows Hall Co. v. Glazier*, 5 Harr. (Del.) 172; *Kennebec & Portland R. R. Co. v. Kendall*, 31 Me. 470. But if a member of a turnpike corporation expressly promise the corporation to pay his proportion of the legal assessments, such promise is good in law, and an action may be maintained for the breach of it, notwithstanding the general remedy of forfeiture provided by statute. *Worcester Turnpike Corporation v. Willard*, 5 Mass. 80.

<sup>1</sup> *Reed v. Richmond Street R. R. Co.*, 50 Ind. 342; *Bucher v. Dillsburg, &c. R. R. Co.*, 76 Penn. St. 396; *Dutchess, &c. R. R. Co. v. Mabbett*, 58 N. Y. 397; *Belfast, &c. R. R. Co. v. Moore*, 60 Me. 561.

<sup>2</sup> *Iowa, &c. R. R. Co. v. Perkins*, 28 Iowa, 281.

<sup>3</sup> *Cayuga Lake R. R. Co. v. Kyle*, 64 N. Y. 185; *Boston, &c. R. R. Co. v. Wellington*, 113 Mass. 79.

<sup>4</sup> *Pittsburgh & Steubenville R. R. Co. v. Gazzam*, 32 Penn. St. 340.

<sup>5</sup> *Hamilton, &c. Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 157; *Brownlee v. Ohio, &c. R. R. Co.*, 18 Ind. 68; *Ashtabula, &c. R. R. Co. v. Smith*, 15 Ohio St. 323.

<sup>6</sup> *Brownlee v. Ohio R. R. Co.*, *ante*.

<sup>7</sup> *Ashtabula, &c. R. R. Co. v. Smith*, 15 Ohio St. 328. A subscription may be made by letter (*Household Ins. Co. v. Grant*, L. R. 4 Exchq. D. 216), or indeed may be made out in the same manner as other ordinary contracts, as, by letters, telegrams, or other documents, which lead up to and make a mutually binding contract. But, if the statute provides the manner in which subscriptions must be made, it must be substantially complied with. *Monterey, &c. R. R. Co. v. Hildreth*, 53 Cal. 123; *Charlotte, &c. R. R. Co. v. Blakely*, 3 Strobb. (S. C.) 245. The rule, when a contract is sought to be made by letter, is that where an offer is so made by one party, and accepted

sary,<sup>1</sup> unless the charter or statute so require, in which case such notice as the statute requires must be given;<sup>2</sup> and if neither the kind nor length of notice is stated, reasonable personal notice must generally be given;<sup>3</sup> although in the case last cited it was held that this rule does not apply to a defaulting subscriber to the stock of a railroad company, when such personal notice is not required by the charter or the terms of the subscription.

But this doctrine must be taken subject to the qualification that, if the charter or general law not only provides that books shall be opened, but that commissioners shall be appointed to open books and receive subscriptions to the stock, a subscription otherwise made, and not accepted by the commissioners, is not valid. Thus, in a Michigan case<sup>4</sup> under the general railroad law, a railroad company was organized with articles of association which fixed the amount of capital stock, and named five commissioners to open subscriptions to the stock. The commissioners, however, never opened such books, but subscriptions were obtained by an agent for the company upon subscription papers, and the plaintiff in error subscribed a certain sum thereon, which he afterwards upon several occasions promised to pay. In an action by the company to

in that or any other mode by the other party, *within a reasonable time*, the contract is complete; and if the letter of acceptance is deposited in the mail within a reasonable time, the fact that it is delayed, or even not received at all by the other party, will not affect the validity of the contract; and this rule applies as well to the sale of, or subscription for, shares in a corporation as to any other contract. *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Gillespie v. Edmonston*, 11 Humph. (Tenn.) 553; *Wheat v. Cross*, 31 Md. 99; *Potts v. Whitehead*, 20 N. Y. Eq. 55; *Washburn v. Fletcher*, 42 Wis. 152; *Household Fire Ins. Co. v. Grant*, 41 L. T. N. S. 298; *Duncan v. Topham*, 8 C. B. 225; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Abbott v. Shepherd*, 48 N. H. 14; *Averill v. Hedge*, 12 Conn. 436; *Harris's Case*, L. R. 7 Ch. App. 587; *Townsend's Case*, L. R. 13 Eq. 148; *Trevor v. Wood*, 36 N. Y. 307; *Levy v. Cohen*, 4 Ga. 1; *Stockton v. Collins*, 7 M. & W. 515; *Hobb's Case*, L. R. 4 Eq. 9; *Falls v. Gaither*, 9 Port. (Ala.) 614; *Hamilton v.*

*Lycoming Ins. Co.*, 9 Penn. St. 339; *Adams v. Lindsell*, 1 B. & Ald. 681; *Hutchinson v. Blakeman*, 3 Met. (Ky.) 80. But see *McCullough v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278, and *KELLY, C. B.*, in *British Am. Tel. Co. v. Colson*, L. R. 6 Exchq. 108 *contra*; but the doctrine of the Massachusetts case is not approved, and the English rule is against the views of *KELLY, C. B.* If, however, the sending of the letter of acceptance is delayed by the fault or negligence of the acceptor or his agents, no contract exists. *Maclay v. Harvey*, 90 Ill. 525; *Averill v. Hedge*, *ante*; *McTier v. Frith*, 6 Wend. (N. Y.) 103; *Adams v. Lindsell*, *ante*.

<sup>1</sup> *Brownlee v. Ohio, &c. R. R. Co.*, *ante*.

<sup>2</sup> *Eppes v. Mississippi, &c. R. R. Co.*, 35 Ala. 33; *Cole v. Joliet Opera House*, 79 Ill. 96; *Mansfield, &c. R. R. Co. v. Hall*, 26 Ohio St. 310.

<sup>3</sup> *Rutland, &c. R. R. Co. v. Thrall*, 35 Vt. 356; *Grubbs v. Vicksburg, &c. R. R. Co.*, 50 Ala. 398.

<sup>4</sup> *Schurtz v. Schoolcraft & Three Rivers R. R. Co.*, 9 Mich. 269.

recover the subscription, the court held that there could be no recovery, because no persons but the commissioners named could accept the subscriptions; and, as there had been no such acceptance, the subscriptions were not binding. So, where the charter or statute provides that subscriptions shall only be made in a certain way, subscriptions made in any other way are not binding. Thus, where the statute provided that subscriptions to the stock of a railway company, could only be made "in the manner to be provided in its by-laws;" it was held that a valid subscription to such stock could not be made until the company had defined by such by-laws the mode in which the subscriptions should be made, and that subscriptions made *before* such by-laws were adopted, where nothing had been done by the subscriber to create an estoppel, were not binding, although subsequently such by-laws were made and expressly adopted such subscriptions.<sup>1</sup>

SEC. 19. **Form of.** — Although the charter or the statute prescribes a form for the making of subscriptions, yet if it is also provided that the company shall have all the powers of a corporation at common law, a subscription following the language of the form, but also containing additional stipulations, not inconsistent with the form prescribed, and which would have been competent for the parties to make at common law, is valid.<sup>2</sup>

<sup>1</sup> Carlisle v. Saginaw, &c. R. R. Co., 27 Mich. 315; 10 Am. Ry. Rep. 283.

<sup>2</sup> Fisher v. Evansville, &c. R. R. Co., 7 Ind. 467. In an action by a railroad company to recover from one subscribing for shares of its stock the balance due for such shares, it appeared that the plaintiff was organized under the general act of 1850, its articles of association were filed, and it became a corporation March 23, 1872. The defendant was not one of the incorporators named in those articles. A short time before the organization of the corporation, the defendant and other persons, for the purpose of aiding and encouraging the construction of the contemplated railroad, subscribed the following instrument, contained in a pocket memorandum-book: "We, the undersigned, in consideration of and for the purpose of becoming stockholders in the Buffalo & Jamestown R. R. Co., do hereby subscribe and take the number of shares, of one hundred dollars each share, of the capital stock of

said company set opposite our respective names, and agree to pay therefor in such time and manner as required by said company." To this the defendant subscribed his name, designating ten as the number of shares, and one thousand dollars as the amount he would pay. This book was then in the possession of one A., who afterward became a director of the company. The names of the defendant and others who subscribed in the book were entered in the stock-ledger of the company as stockholders, and defendant and others were notified to pay calls of instalments on the stock. The defendant paid two instalments of ten per cent each upon his subscription, and took from the agent of the corporation a receipt, wherein it was set forth that the payment was on his subscription to the capital stock of the corporation. Thereafter he refused to pay further instalments, and this action was brought. It was held that there was a valid subscription by defendant to

Where neither the charter nor general law provides the form in which subscriptions shall be taken, any form which shows the intention of the party to become a stockholder is sufficient. A subscription in this form, "Phenix Warehousing Co. Daniel D. Badger, 250 shares," without stating the par value of the shares, has been held sufficient, because, as the subscription is made with reference to the charter, reference thereto fixes the amount, and the terms of the contract.<sup>1</sup>

the stock of the corporation, both at common law and under the provisions of the statute. While the subscription was not valid and binding before the complete formation of the corporation, because there was no party with whom the defendant could then contract, yet after the corporation was formed it accepted the subscription and recognized the defendant as a stockholder, and he recognized himself as such, and ratified and confirmed his subscription by payments thereon. He thus, within all the authorities, upon general principles, became a stockholder in the company, liable to pay the full amount of his subscription. *Upton v. Tribilcock*, 91 U. S. 65; *Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 N. Y. 336. And there was a substantial compliance with the statute in relation to subscriptions. The articles of association of the corporation set forth that it was to build a railroad from Buffalo to the Pennsylvania State line. The road was built to a point twelve miles short of the State line, and was not built further. It did not appear that the company had taken any action which would disable it from building these twelve miles. It was held, that these facts did not relieve defendant from his subscription. After the commencement of this suit a mortgage on the railroad and its franchises was foreclosed, and the property sold to purchasers, and it was held that this did not furnish a defence to this action. *Buffalo, &c. R. R. Co. v. Gifford*, 87 N. Y. 294. The case, *Lake Ont. Sh. R. Co. v. Curtiss*, 80 N. Y. 219, was distinguished.

<sup>1</sup> *Phenix Warehousing Co. v. Badger*, 6 Hun (N. Y.), 292; *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 336; *Dayton v. Borst*, 31 id. 435; *Lake Ontario, &c. R. R.*

*Co. v. Mason*, 16 id. 451; *Nulton v. Clayton*, 54 Iowa, 525; *Hawley v. Upton*, 102 U. S. 314. In *Spear v. Crawford*, 14 Wend. (N. Y.) 20, the writing subscribed was in these words: "We, the subscribers, do hereby severally agree to take the shares by us subscribed in the Harlem Canal Company." A certain number of shares was set opposite the name of each subscriber. The question presented was, whether the mere agreement to take shares rendered the defendant liable to pay for them. The court held that it did. In *Hartford & New Haven R. R. Co. v. Kennedy*, 12 Conn. 500, the word "subscriber" was used in what was claimed to be the subscription to stock. It was held that the subscriber was liable to pay for the stock, without a promise to do so in so many words. The court said: "It is true, a promise to pay in precise terms does not appear to have been made. The defendant has not affixed his signature to an instrument which contains the words, 'I promise to pay,' but he has done an equivalent act. He has contracted with the plaintiff to become a member of the corporation, and to be interested in its stock." In *Rensselaer & W. Plank Road Co. v. Barton*, 16 N. Y. 460, the court said: "Whatever may be the form or language of a subscription to the stock of an incorporated company, any person who in any manner becomes a subscriber for, or engages to take any portion of, the stock of such company, thereby assumes to pay according to the conditions of the charter." See, also, *Small v. Herkimer Manufacturing & Hydraulic Co.*, 2 N. Y. 335; *Dayton v. Borst*, 31 N. Y. 437; *Hartford & New Haven R. R. Co. v. Crosswell*, 5 Hill (N. Y.), 384; *Waukon & Mississippi R. R. Co. v. Dwyer*, 49 Iowa, 121.

**SEC. 20. Effect of Subscription: Taking Stock at less than par.** *When the subscription is accepted by the corporation,* the subscriber becomes a stockholder, although no certificate is issued to him, and thereupon becomes liable as, and entitled to all the privileges of, a member. Thus in a recent case<sup>1</sup> the defendant, in 1871, was requested by R., the agent of an insurance company, to subscribe for its stock. In consequence of the inducements offered, he subscribed the paper and delivered it to the agent: "The Great Western Insurance Company. [\$200.] Capital stock \$500,000, with liberty to increase to \$5,000,000. Stock non-assessable. Organized July 20th, 1857, under act of Legislature approved March 4th, 1857. Know all men by these presents, that for and in consideration of ten shares of the capital stock of the Great Western Insurance Company of Chicago, Ill., received by me, I am held and firmly bound, and agree to pay the Great Western Insurance Company of Chicago the sum of two hundred dollars in instalments, as follows: twenty-five per cent thereof upon receipt of stock-certificate, twenty-five per cent in three months from date hereof, twenty-five per cent six months from date hereof, twenty-five per cent nine months from date, with interest 10 per cent after due." At the time, he paid the agent \$25. No certificate of stock was ever given to him, and he demanded none, and paid no assessments. The company became bankrupt. In an action by the assignee in bankruptcy against defendant as a stockholder, it was held that he was such, and liable for the amount of stock set forth in the paper signed by him.<sup>2</sup>

If neither the charter nor general law specifies the manner in which subscriptions shall be taken, and the power to accept subscriptions is vested in the company, an unconditional subscription to its stock made in any form, which is accepted by it, is valid;<sup>3</sup> because in such cases the company has the power to accept

<sup>1</sup> Hawley v. Upton, 102 U. S. 314.

<sup>2</sup> Upton v. Tribilcock, 91 U. S. 45; Webster v. Upton, 91 id. 65.

<sup>3</sup> Wellensburgh, &c. Plank Road Co. v. Young, 12 Md. 476. The doctrine of this case is not in conflict with that of the Michigan case cited below, because in this case there was no specific mode for taking the subscriptions provided by the charter, and no proof that the mode adopted was at variance with any law applicable to the subject; while in Carlisle

v. Saginaw, &c. R. R. Co., 27 Mich. 315 (see also Schurtz v. Schoolcraft, &c. R. R. Co., 9 Mich. 269), the law provided that the company should, by its *by-laws*, designate a mode, and not having done so until after certain subscriptions had been made, it is clear that it could not vitalize such subscriptions by its subsequent compliance with the law, unless the subscriber had done some decisive act which estopped him from setting up such objection.

subscriptions *in any form*, and if enough has been done by the subscribers to create an obligation to take and pay for the stock, *when the company accepts the subscription* it becomes mutually binding, however it was made.<sup>1</sup> Thus it has been held that a corporation may recover upon a subscription to its stock procured by one who acted as agent, although at the time he was not authorized to take such subscriptions, *provided the company subsequently ratified his acts in that respect*; and the bringing of an action to recover such subscription was held a sufficient ratification by them.<sup>2</sup>

A subscription to the stock of a railroad corporation creates a debt against the subscribers in favor of the corporation, from which he cannot relieve himself by assignment or transfer without the sanction of the proper officers;<sup>3</sup> and not only does it create a debt in favor of the corporation, but it is also an undertaking with all the other subscribers; and even though fraudulent as between the parties, it is enforceable for the benefit of the other parties in interest,<sup>4</sup> or of the creditors of the corporation. If stock has been subscribed for at its par value, but with an understanding with the corporation that a sum less than par shall be received in full therefor, and which is actually paid, the subscriber is liable to the creditors of the corporation for the difference between the sum paid and the par

<sup>1</sup> In *Mobile & Ohio R. R. Co. v. Yandel*, 5 Sneed (Tenn.), 294, a subscription made at a meeting not authorized by the corporation, but which was afterwards transferred to its books, was held enforceable, because, by the acceptance of the subscription by it, the action at such meeting was ratified and adopted. *South Bay Meadow Co. v. Gray*, 30 Me. 547. In *Parker v. Northern Central Michigan R. R. Co.*, 33 Mich. 23, it was held that subscriptions are only binding upon a subscriber when the corporation is also bound,—that is, when the contract is mutual; and consequently that, as in that State, the statute creates no obligation on the corporation, except upon subscriptions regularly made, no others can be enforced unless they were made upon some actual consideration or agreement binding the company.

<sup>2</sup> *Walker v. Mobile & Ohio R. R. Co.*, 34 Miss. 245. But it seems that the commencement of an action for a subscription, or even a demand of payment,

is not sufficient to evidence an acceptance where the subscription is otherwise invalid; but in such cases there must be an *actual* acceptance. *Northern Central Michigan R. R. Co. v. Eslow*, 40 Mich. 222. The corporation may elect to reject such subscriptions taken by persons not authorized by it. *Taggart v. Western Maryland R. R. Co.*, 24 Md. 563; *Walker v. Mobile, &c. R. R. Co.*, 34 Miss. 245; *Mobile, &c. R. R. Co. v. Yandal*, 5 Sneed (Tenn.), 294; *Melvin v. Haitt*, 52 N. H. 61. But after it has ratified the act, the subscription becomes binding upon it, and it may be shown by parol that the corporation accepted it. *Mansfield, &c. R. R. Co. v. Brown*, 26 Ohio St. 223. But, until the corporation has ratified it, the subscription may be revoked by the subscriber, but not afterward. *Lowe v. E. & K. R. R. Co.*, 1 Head (Tenn.), 659.

<sup>3</sup> *Graff v. Pittsburgh, &c. R. R. Co.*, 31 Penn. St. 489.

<sup>4</sup> *Graff v. Pittsburgh, &c. R. R. Co.*, *ante*.

value of the stock.<sup>1</sup> Thus in the case last cited, where the defendants subscribed and agreed to pay certain sums of money toward the increased capital stock of a corporation, with the understanding that they were to receive stock therefor at sixty-six and two-thirds cents upon the dollar, and this arrangement was carried out, and certificates for the stock delivered to them, it was held that the assignee in bankruptcy of the corporation might still collect the remaining one-third of the par value of the stock for the benefit of its creditors.<sup>2</sup> And the creditors and stockholders of an insolvent corporation may unite in a suit in equity in behalf of themselves and other creditors and stockholders, to enforce the liability of holders of unpaid shares of the capital stock of such corporation; and where stockholders are indebted to the corporation on stock subscriptions, the sum due may be reached by a creditor's bill; and where, by any dealings between the corporations and its stockholders, the capital stock, which is a fund for the payment of its debts, is wrongfully diverted, a creditor can reach it. The court of equity assists him, not in the exercise of its jurisdiction over trusts, but in the exercise of its auxiliary jurisdiction in behalf of creditors.<sup>3</sup> If a stockholder is indebted to the corporation on account of his subscription to the stock, a court of equity will aid a creditor of the corporation to reach this fund by a proper decree,<sup>4</sup>

<sup>1</sup> *Flinn v. Bagley*, 7 Fed. Rep.

<sup>2</sup> *Hawley v. Upton*, 102 U. S. 314; *Sturgis v. Stetson*, 1 Bissell (U. S. C. C.), 246; *Parker v. North C. M. R. Co.*, 33 Mich. 24; *Cutter v. Powell*, 6 T. R. 324; *Pittsburgh & C. R. R. Co. v. Stewart*, 41 Penn. St. 54; *Currie's Case*, 3 De G. J. & S. 367; *Carling's Case*, L. R. 1 Ch. D. 115; *De Ruigne's Case*, 5 id. 386; *Anderson's Case*, 7 id. 94; *Foreman v. Bigelow*, 18 N. B. R. (U. S.) 457; *Upton v. Tribilecock*, 91 U. S. 45; *Chubb v. Upton*, 95 id. 666; *Pullman v. Upton*, 96 id. 328; *Hatch v. Dana*, 101 id. 205.

<sup>3</sup> *Walser v. Seligman*, 13 Fed. Rep.; *Thompson's Liability of Stockholders*, § 15.

<sup>4</sup> In *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593, the act incorporating a manufacturing company provided that the capital stock of the corporation should not exceed fifty thousand dollars; that a share of the stock should be one hundred dollars; that the directors might

call in the subscriptions to the capital stock by instalments, in such proportions, and at such times and places as they should think proper; that the stock, property, and affairs of the corporation should be managed by the directors, who were required to be stockholders; and that they should have power to establish such rules and regulations as they should think expedient. The act also provided, in effect, that within three months not less than five thousand dollars of the capital stock should be actually paid, which should not be withdrawn so as to reduce the same below five thousand dollars. After the stockholders had paid in forty per cent on their subscriptions, the corporation became insolvent, having no visible property. On a bill in chancery, brought by certain creditors, for the benefit of all, against the stockholders, praying that they might be compelled to pay in the remaining sixty per cent (or so much thereof as should be necessary), to



either compelling the directors to make or collect an assessment<sup>1</sup> or compelling payment by its own processes.<sup>2</sup> The portion of a subscription remaining unpaid is a part of the corporate capital, and subject to the claims of creditors; and this is so, notwithstanding a stipulation, in the contract of subscription, that it shall be payable only on the call of the company. Such a condition is operative as between stockholders, but cannot be permitted to defeat the rights of creditors.<sup>3</sup>

**SEC. 21. Subscription does not necessarily make the Subscriber a Member of the Corporation.** — A person is not made a member by a mere subscription, especially when his subscription is conditional.<sup>4</sup> His subscription may be treated as in the nature of an application to become a shareholder in, and member of, the corporation; and, upon the acceptance of his subscription by the corporation, he at once becomes so. The rule may be said to be, that, to make a per-

be applied in payment of the debts of the corporation, it was held, first, that the obligation which the stockholders assumed, by their subscription to the capital stock of the corporation, was to pay the sum of one hundred dollars on each share, in such instalments and at such times as should be required by the directors; second, that the amount of the shares subscribed, and not the sum actually paid in, constituted the capital stock of the corporation; third, that when further instalments became necessary to meet the debts of the corporation, it was the duty of the directors to cause them to be made, the discretionary power of the directors being modal only, relating to the time and manner of payment; fourth, that this duty might be enforced by a decree in chancery; and, consequently, that the relief sought should be granted. See also *Adler v. Milwaukee Patent Brick Co.*, 13 Wis. 62; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Marsh v. Burroughs*, 1 Wood (U. S. C. C.), 463; *Henry v. Vermillion, &c. R. R. Co.*, 17 Ohio, 187.

<sup>1</sup> *Briggs v. Penniman*, 8 Cow. (N. Y.) 396; *Hightower v. Thornton*, 8 Ga. 493; *Salmon v. Hamborough Co.*, 1 Cas. in Ch. 204. In *Gibson v. Lewis*, 11 Bankr. Reg. 247 (U. S. C. C.) the charter of a railroad company provided that, in default by any stockholder to pay an assessment

on his stock after a prescribed notice, the stock, and any payments thereon, should be forfeited to the company. The company failing to pay the accrued interest on its mortgage bonds, the bondholders were about to institute proceedings against it to compel an assessment of the necessary and proper contributory payments on stock, which they alleged had not been properly paid for. On a bill filed to restrain a distribution of the assets in bankruptcy of a firm holding such stock, until proof could be made of the expected assessments on the shares of the bankrupts as a debt in bankruptcy, it was held, that there should be *primarily* a decree compelling the company to make the necessary and proper assessments upon the stock, and to prevent the use of any fictitious certificates indicating that the stock had been fully paid for; that *secondary* relief should be to compel the making and allowance of proof in the bankruptcy proceedings of the amount previously ascertained as due for the assessment on the shares of the stock which were held by the bankrupts.

<sup>2</sup> *Briggs v. Penniman*, *ante*; *Slee v. Bloom*, 19 Johns. (N. Y.) 484; *Pettibone v. McGraw*, 6 Mich. 441.

<sup>3</sup> *Curry v. Woodward*, 53 Ala. 371.

<sup>4</sup> *Chase v. Sycamore, &c. R. R. Co.*, 38 Ill. 215.

son a shareholder in a corporation where he has subscribed for the stock, it is not necessary that he should have received a certificate, or paid for the stock. A corporation may, in the absence of any statutory provision to the contrary, give credit for its stock, as well as for any other property sold by it. Certificates only constitute proof of property, which may exist without them. *When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract made upon a valuable consideration.*<sup>1</sup>

**SEC. 22. Conditions in Charter.**—If the charter contains any condition precedent, unless such condition is complied with by the subscriber he does not become a shareholder, even though the corporation has accepted his subscription. Thus there are a class of cases in which it is held that a corporation, whose charter and by-laws require each subscriber to its capital stock to pay a given percentage of his subscription *in cash at the time of subscribing*, cannot enforce payment of a subscription where the required cash payment has not been made.<sup>2</sup> But even under such a provision it is held that such payment may be made by check upon a bank in which the subscriber has funds to meet it,<sup>3</sup> unless the bank, for cause and in good faith, refuses to pay it.<sup>4</sup> So, where payment has been made by note, which has been negotiated by the corporation, and paid by the subscriber at maturity, the transaction, *upon the payment of the note*, is treated as a payment in cash.<sup>5</sup> But this doctrine is not believed to be sound, and statutes providing that "each subscriber shall at the time of subscribing pay five dollars on each share for which he may subscribe," are believed to be directory rather than

<sup>1</sup> *Chaffin v. Cummings*, 37 Me. 83. See also *Spear v. Crawford*, 14 Wend. (N. Y.) 20; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Re South Mountain Mining Co.*, 7 Sawyer (U. S. C. C.), 30; *Mitchell v. Beckman* (Cal.); *Schaeffer v. Missouri Ins. Co.*, 46 Mo. 248; *Beckett v. Houston*, 32 Ind. 393.

<sup>2</sup> *Pearce v. M. & I. R. Co.*, 21 How. (U. S.) 441; *Black R. & U. R. R. Co. v. Clark*, 25 N. Y. 208; *Crocker v. Crane*, 21 Wend. (N. Y.) 211; *Beach v. Smith*, 30 N. Y. 116; *Hibernia Turnpike Co. v.*

*Henderson*, 8 S. & R. (Penn.) 217; *Jenkins v. Union Turnpike Co.*, 1 Cal. Cas. (N. Y.) 86; *Highland Turnpike Co. v. McKean*, 11 Johns. (N. Y.) 98; *Sturgis v. Stetson*, 1 Biss. (U. S. C. C.) 246; *Fosdick v. Sturgis*, id. 255; *State Insurance Co. v. Redmond*, 13 Fed. Rep. 541; *People v. Chambers*, 42 Cal. 201.

<sup>3</sup> *People v. Stockton, &c. R. R. Co.*, 45 Cal. 306.

<sup>4</sup> *Comins v. Coe*, 117 Mass. 45.

<sup>5</sup> *Ogdensburg, &c. R. R. Co. v. Wooley*, 3 Abb. App. Dec. (N. Y.) 398.

mandatory, and not in the nature of a condition precedent;<sup>1</sup> and a subscriber who fails to comply with this requirement cannot avail himself of his *laches* in that respect to avoid his subscription.<sup>2</sup> Of course, where conditions are imposed by contract, they may be waived by either party; and where neither the charter nor general law either expressly or impliedly provides the manner in which subscriptions shall be paid, the proper officers may receive payment therefor in any species of property.<sup>3</sup>

Thus, in an early Vermont case,<sup>4</sup> by section four of the statute incorporating the Vermont Central R. R. Co., certain persons named are constituted commissioners for receiving subscriptions to the capital stock of the company; and it was enacted as follows: "And every person, at the time of subscribing, shall pay to the commissioners five dollars on each share for which he may subscribe, and each subscriber shall be a member of said company;" and it was further enacted, that when one thousand shares should be subscribed, the commissioners might issue a notice for the stockholders to meet and elect directors. The defendant, after some other shares, but less than one thousand, had been subscribed for, subscribed for fifty shares, and, instead of paying to the commissioners, in money, five dollars upon each share at the time of subscribing, he gave them his promissory note for that amount, being two hundred and fifty dollars, which was made payable to "The Commissioners of the Vermont Central R. R. Co." on demand, for value received. This note was received from the commissioners by the corporation upon its organization. And it was held that the note was given upon sufficient consideration, and that it was a valid note in the hands of the corporation, and that an action might be sustained upon the note in the name of the corporation. It was also held that the provision in the charter, that each subscriber should be a member of the company, and the fact that others had subscribed for stock previous to the defendant's subscription, were sufficient to show that the corporation was *in esse* at the time of making the

<sup>1</sup> East Gloucestershire R. R. Co. v. Bartholomew, L. R. 3 Exchq. 15; McEwen v. West London, &c. R. R. Co., L. R. 6 Ch. 665; Chaffin v. Cummings, 37 Me. 76; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Haynes v. Brown, 36 id. 545; Chesley v. Pierce, 32 id. 402; Black River R. R. Co. v. Clarke, 25 N. Y. 208; Hall v. Selma, &c. R. R. Co., 6 Ala. 741;

Smith v. Plank Road Co., 30 id. 650; Beach v. Smith, 28 Barb. (N. Y.) 254.

<sup>2</sup> Lake Ontario, &c. R. R. Co. v. Mason, 16 N. Y. 451.

<sup>3</sup> East N. Y., &c. R. R. Co. v. Light-hall, 6 Robt. (N. Y.) 407.

<sup>4</sup> Vermont Central R. R. Co. v. Cloyes, 21 Vt. 30; 1 Am. R. R. Cas. 226.

note, and so capable of taking the promise through their agents, the commissioners, notwithstanding their right to organize was made to depend upon certain conditions, which were not fully complied with until after the note was executed. "We do not think," says BENNETT, J., "that the simple fact that the commissioners accepted the note of the defendant in lieu of money, or, as the case finds, in settlement of the sum which was to have been paid upon the making of the subscription, can have the effect to give the defendant the right to repudiate his contract, or render it void for want of consideration. The corporation having accepted this note as so much cash, could not certainly deny to the defendant the rights and privileges of a corporator."

**SEC. 23. Subscriber cannot be released by Corporation.** — Where a person has actually subscribed for stock in a corporation, he cannot withdraw therefrom without the consent of all the stockholders; therefore the erasure of his name from the subscription-book does not release him from his contract.<sup>1</sup> And it is generally held, in this country, that the corporation cannot, to the detriment of either creditors or other stockholders, release either a stockholder or subscriber from the liability which his contract imposes.<sup>2</sup> In the case last cited, the court says: "It has been settled by numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the State shall lose any of the benefits of his subscription. Every such arrangement is regarded in equity not merely as *ultra vires*, but as a fraud upon the other stockholders, upon the public, and upon the creditors of the company."<sup>3</sup> There are dicta to be found in some of the cases to the effect that a release will be good if *bond fide* and upon a good consideration, or if the corporation is not indebted;<sup>4</sup> but neither the *bona fides* of the transaction, nor the fact that the corporation is not

<sup>1</sup> Johnson v. Wabash, &c. R. R. Co., 16 Ind. 389.

<sup>2</sup> Burke v. Smith, 16 Wall. (U. S.) 390.

<sup>3</sup> See also to the same effect Mann v. Cooke, 20 Conn. 178. *In re Bachman*, 12 Bankr. Reg. 223; Bedford R. R. Co. v. Bowser, 48 Penn. St. 29; Mann v. Currie, 2 Barb. (N. Y.) 294; Osgood v. King, 42 Iowa. In some cases an exception has been made to this rule. Cooper v. Fredrick, 9 Ala. 738; City Bank of Columbus

v. Bruce, 17 N. Y. 507. But the great weight of authority is the other way, and for the reasons stated in the text necessarily must be, or the most important principle relating to the status of corporations is overthrown. Putnam v. New Albany, 4 Biss. (U. S. C. C.) 365; Slee v. Bloom, 19 Johns. (N. Y.) 456; Melvin v. Lamar Ins. Co., 80 Ill. 446; Hughes v. Antietam &c. Co., 34 Md. 316.

<sup>4</sup> Firkel v. Joliet Opera House, 79 Ill. 334; Melvin v. Lamar Ins. Co., 80 Ill. 459.

indebted, can give to such an act any validity, in view of the fact that the officers of the company, except it is expressly conferred by statute, have no power to enter into any such arrangement. The principle upon which this doctrine rests, is, that the capital of a corporation paid in, or agreed to be paid in, is a fund held in trust by the corporation for its creditors and stockholders, which cannot be squandered or given away by the trustees;<sup>1</sup> and this fund can be reached in a court of equity by the creditors of the corporation;<sup>2</sup> and the *directors cannot release a subscriber from his engagement when his liability as such has once been fixed*;<sup>3</sup> and to surrender a subscription is not within the general powers of directors. Where the board have assumed to allow a subscriber (even under a contract prior to his subscription) to surrender his stock, and have a return of the assessments already paid by him, this operates as a fraud on other stockholders, and any one of them may, by bill in equity, have the money so withdrawn refunded, and the subscriber thus released declared liable on his subscription, the same as other subscribers.<sup>4</sup>

**SEC. 24. Contract is several.** — Such contracts are several, although many persons sign the same contract, and an action can only be maintained against each signer upon the contract made by him.<sup>5</sup>

<sup>1</sup> *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 id. 45; *Webster v. Upton*, 91 id. 65; *Van Cott v. Van Brunt*, 2 Abb. (N. Y.) N. C. 283; *Marsh v. Burroughs*, 1 Wood (U. S. C. C.), 463; *Bassett v. St. Albans, &c. Co.*, 47 Vt. 313; *Schenck v. Andrews*, 57 N. Y. 133; *Schaeffer v. Missouri, &c. Ins. Co.*, 46 Mo. 248; *Currier v. Lebanon Slate Co.*, 56 N. H. 262. The directors of a corporation stand in confidential relations to its creditors, toward whom they are bound to act with perfect fairness. They are at least *quasi* trustees for the creditors; and where the corporation is insolvent, good faith forbids that the directors should use their position to save themselves or one of their number at the expense of other creditors. Where the board of directors of an insolvent corporation confessed a judgment against the corporation in favor of one of their number, who was also the president of the corporation and principal stockholder, with a view of giving him priority of lien over another creditor, who

was about to obtain a judgment in a judicial proceeding, *held*, that such preference could not be upheld, but that the two judgments must stand on a footing of equality in respect to the commencement of the lien, and share *pro rata* in the proceeds of the property available for their payment. *Drury v. Cross*, 7 Wall. (U. S.) 302; *Jackson v. Ludeling*, 21 id. 616; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263.

<sup>2</sup> *Marsh v. Burroughs*, *ante*; *Bassett v. St. Albans, &c. Co.*, 47 Vt. 313; *Schaeffer v. Missouri, &c. Ins. Co.*, 46 Mo. 248.

<sup>3</sup> *Putnam v. New Albany*, 4 Biss. (U. S. C. C.) 365; *Finkel v. Joliet Opera House Co.*, 79 Ill. 344; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Osgood v. King*, 42 Iowa, 478.

<sup>4</sup> *Melvin v. Lamar Ins. Co.*, 80 Ill. 446.

<sup>5</sup> *Price v. Grand Rapids, &c. R. R. Co.*, 18 Ind. 137; *Erie & N. Y. R. R. Co. v. Patrick*, 2 Abb. App. Cas. (N. Y.) 72; *Keyes* (N. Y.), 256.

Therefore, where two subscriptions are made to the same stock by the same person, one as an individual and another in some other capacity, — as an executor, trustee, etc., — separate actions must be brought for the recovery of each.<sup>1</sup> Each subscription is an independent undertaking, and in no way affected by the terms of other subscriptions.<sup>2</sup>

**SEC. 25. Agreements to Subscribe.** — A mere agreement *to subscribe* for stock in a corporation is not a subscription for stock;<sup>3</sup> but under such an agreement, a person is liable for all the actual damages resulting to the corporation from his failure to subscribe, and in such cases the par value of the stock is not the measure of recovery.<sup>4</sup>

**SEC. 26. Agreement to take and fill.** — An agreement to take a certain number of shares of the capital stock of a company, entered into in writing before the company is incorporated, is held by some of the cases to create at least an implied contract to pay, which will sustain an action by the corporation when it comes into existence to recover calls on the stock,<sup>5</sup> and an agreement to “take and fill” a certain number of shares is equivalent to a promise to take and pay for them.<sup>6</sup> Of course, agreements to take stock, as a rule, always relate to corporations which exist only in contemplation, and are to be thereafter formed; and there is always an implied condition connected with such agreements, that such agreement shall only be operative when the corporation comes into existence, and unless this implied condition is complied with, the agreement has no validity. And agreeably to the common-law rule, that, in order to give validity to a promise, there must, at the time when it was made, be a person *in esse* to receive it, it is difficult to see how such a subscription made before the corporation was incorporated, can be

<sup>1</sup> Erie, &c. R. R. Co. v. Patrick, *ante*.

<sup>2</sup> Connecticut & Passumpsic R. R. Co. v. Bailey, 24 Vt. 465.

<sup>3</sup> Mount Sterling Coal Road Co. v. Little, 14 Bush (Ky.), 429.

<sup>4</sup> Thrasher v. Pike, &c. R. R. Co., 25 Ill. 393.

<sup>5</sup> Buffalo & N. Y. City R. R. Co. v. Dudley, 14 N. Y. 336; Johnson v. Wabash, &c. R. R. Co., 16 Ind. 389; Penobscot R. R. Co. v. Dummer, 40 Me. 172; Anderson v. Newcastle, &c. R. R. Co., 12 Ind. 376; Tanica, &c. R. R. Co. v. Neeley, 21 Ill. 71; Midland Great Western Railway, 16 M. & W. 804; Hughes v. Antietam Mfg. Co., 34 Md. 316.

<sup>6</sup> Penobscot, &c. R. R. Co. v. Dunn, 39 Me. 587; and is liable to pay all assessments legally made thereon, Buckfield Branch R. R. Co. v. Irish, 39 id. 44; Fry v. Lexington, &c. R. R. Co., 2 Met. (Ky.) 314; Troy, &c. R. R. Co. v. Tibbetts, 18 Barb. (N. Y.) 298; City Hotel v. Dickinson, 6 Gray (Mass.), 586; Northern R. R. Co. v. Miller, 10 Barb. (N. Y.) 260; Buffalo, &c. R. R. Co. v. Dudley, 14 N. Y. 336; Fort Edward, &c. Plank Road Co. v. Payne, 17 Barb. (N. Y.) 567; Merrimac Mining Co. v. Levy, 54 Penn. St. 227; Dayton v. Borst, 31 N. Y. 435.

enforced, unless the subscriber, *after* the incorporation, does some act in affirmance of his former promise.<sup>1</sup> There is a wide distinction between subscriptions taken after incorporation, but before organization, and those taken before any incorporation exists; because, in the former case the corporation has come into existence, although it has no power to enforce its rights as such until after organization,<sup>2</sup> when, if the corporation accepts such subscriptions, a right to recover the same, which had previously been suspended, attaches by virtue of the subscription.<sup>3</sup> The legal formation of a corporation, for the purposes named in the charter, is, however, a condition precedent to the right to enforce the subscriber's obligation.<sup>4</sup> Even if, as is held in some of the cases, organization is essential to the existence of a corporation,<sup>5</sup> yet there is no question but that the subscriber, who made his subscription *before* organization, may subsequently ratify it by any such decisive acts as indicate his intention to be bound thereby, so as to give it full validity.<sup>6</sup> When a corporation is formed under the general statutes, the articles of association stand as the charter when properly filed or recorded as provided by the statute;<sup>7</sup> and in some of the States it is held that a subscription to the stock becomes obligatory before the final steps are taken,<sup>8</sup> while in others, it is held that such subscriptions do not become obligatory until all the essential steps to give the corporation full vitality have been taken.<sup>9</sup>

<sup>1</sup> *Monterey v. S. & V. R. R. Co.*, 53 Cal. 123; *Strasburg R. R. Co. v. Echternect*, 21 Penn. St. 220; *Thrasher v. Pike Co. R. R. Co.*, 25 Ill. 393; *Goff v. Winchester College*, 6 Bush (Ky.), 443; *Mt. Sterling Coal Road Co. v. Little*, 14 id. 429; *Gleaves v. Brick Church Turnpike Co.*, 1 Sneed (Tenn.), 491.

<sup>2</sup> *Vermont Mining, &c. Co. v. Windham Co. Bank*, 44 Vt. 489; *Marlborough Branch R. R. Co. v. Arnold*, 9 Gray (Mass.), 159; *Low v. Conn. & Passumpsic River R. R. Co.*, 45 N. H. 376; *Diman v. Providence, W. & B. R. R. Co.*, 5 R. I. 130; *Stoops v. Greensburgh, &c. Plank Road Co.*, 10 Ind. 47; *Rathbone v. Tioga Nav. Co.*, 2 W. & S. (Penn.) 74; *Oregon Central R. R. Co. v. Scoggin*, 3 Oregon, 161; *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 435; *Hartford, &c. R. R. Co. v. Kennedy*, 12 id. 499; *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H. 548; *Lackey v. Richmond, &c. Turnpike Co.*, 17 B.

*Mon. (Ky.)* 43; *Selma Turnpike Co. v. Tipton*, 5 Ala. 78.

<sup>3</sup> *Storrs, J.*, in *Danbury, &c. R. R. v. Wilson*, 22 Conn. 453.

<sup>4</sup> *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H. 548; *Athol Music Co. v. Carey*, 116 Mass. 471; *Starrett v. Rockland F. & M. Ins. Co.*, 65 Me. 374.

<sup>5</sup> *Starrett v. Ins. Co.*, *ante*.

<sup>6</sup> *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; *Kennebec, &c. R. R. Co. v. Palmer*, 34 id. 366; *Chaffin v. Cummings*, 37 id. 76; *Lexington, &c. R. R. Co. v. Chandler*, 13 Met. (Mass.) 311.

<sup>7</sup> *Cincinnati, &c. R. R. Co. v. Danville, &c. R. R. Co.*, 75 Ill. 113.

<sup>8</sup> *Anderson v. Newcastle, &c. R. R. Co.*, 12 Ind. 376; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Hamilton, &c. Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 157.

<sup>9</sup> *Garrett v. Dillsburg, &c. R. R. Co.*, 78 Penn. St. 465; *Rikhoff v. Brown's*

To entitle a person to become a member of a corporation which is being organized, his contract to take shares therein must be in writing, *and be mutually binding on both parties*. A verbal promise to take shares, while the stock is being subscribed which is necessary to authorize an organization, does not constitute the promisor a stockholder or member of such corporation, and a promise to pay for such shares is without a sufficient consideration to support it. A recovery on such promise to pay cannot be had, in the absence of facts showing that the promisor is estopped from setting up such want of consideration.<sup>1</sup> The criterion of liability in such cases is whether any act has been done which compels the corporation to recognize the promisor as a stockholder. If the corporation is not bound, the promisor is not,<sup>2</sup> as there is no consideration to support the promise and it is a mere *nudum pactum*;<sup>3</sup> and a note and mortgage given to secure such promise cannot be enforced.<sup>4</sup>

**SEC. 27. Colorable or fictitious Subscriptions.** — Where a subscription is made by one for another, without authority from such person,<sup>5</sup> or where it is made by one person for the benefit of *two* persons, and there is no firm of that name, the person making the subscription is alone liable thereon.<sup>6</sup> Thus, in the case cited from New York, a subscription signed by B. Spencer in the name of B. & S. M. Spencer was held to be binding upon B. Spencer, there being no firm of the name of B. & S. M. Spencer, and no authority shown to subscribe for such stock for S. M. Spencer jointly with himself. But, where a subscription is made in the name of another without authority, such person may ratify and adopt the subscrip-

Rotary Sewing Machine Co., 68 Ind. 388; Buffalo, &c. R. R. Co. v. Hatch, 20 N. Y. 157; Erie, &c. R. R. Co. v. Owen, 32 Barb. (N. Y.) 616; Phenix Warehousing Co. v. Badger, 67 N. Y. 294; Ashuelot Boot & Shoe Co. v. Hoyt, *ante*; Lake Ontario, &c. R. R. Co. v. Mason, 16 N. Y. 451.

<sup>1</sup> Valk v. Crandall, 1 Sandf. (N. Y.) Ch. 179; Tonica &c. R. R. Co. v. Stein, 21 Ill. 96; Chester Glass Co. v. Dewey, 16 Mass. 94; Spear v. Crawford, 14 Wend. (N. Y.) 20; Selma & Tenn. R. R. v. Tipton, 5 Ala. 787; Phillips Limerick Academy v. Davis, 11 Mass. 118; New Bedford J. Co. v. Adams, 8 Mass. 138; Essex Turnpike Co. v. Collins, 4 Mass. 292; Lake Ontario, A. & N. Y. R. R. Co. v. Mason, 16 N. Y. 451; Vreeland v. N.

J. Stone Co., 29 N. J. Eq. 188; P. & S. R. R. Co. v. Gazzam, 32 Penn. St. 340; Thames Tunnel Co. v. Sheldon, 6 B. & C. 341; Fanning v. Insurance Co., 37 Ohio St. 539; 41 Am. Rep. 517.

<sup>2</sup> Thames Tunnel Co. v. Sheldon, 6 B. & C. 341; Fanning v. Ins. Co., 37 Ohio St. 539.

<sup>3</sup> JOHNSON, J., in Fanning v. Ins. Co., *ante*.

<sup>4</sup> Fanning v. Ins. Co., *ante*.

<sup>5</sup> In State v. Smith, 48 Vt. 266, a person who made subscription in the name of another, was held liable as a subscriber.

<sup>6</sup> Union Hotel Co. v. Hersee, 79 N. Y. 754. See s. c. 15 Hun (N. Y.), 371, for statement of facts. Ticonic Water Power Co. v. Lang, 63 Me. 480.



tion, and thereafter is liable upon it the same as though it had been originally made by himself.<sup>1</sup> But the question as to whether the person in whose name the subscription was so made has ratified it or not, is a mixed one of law and fact.<sup>2</sup> A subscription may be made by one partner in the name of the firm,<sup>3</sup> or by an attorney or agent in the name of his principal, although the charter provides that it shall not be lawful for any person to subscribe in the name of another person.<sup>4</sup>

If a person subscribes for shares in a fictitious name, if the identity of the person subscribing can be ascertained, he will be held liable upon the subscription the same as though he had subscribed for them in his own name; and such also is the case where subscriptions are made by a parent in the name of his infant children, but really for his own benefit; although in such cases it is optional with the corporation whether to accept the subscription or to treat it as fraudulent, *if done immediately upon discovering the fraud*;<sup>5</sup> but, if the corporation recognizes the subscription as valid, and does any decisive act evincing an acceptance thereof, it is thereby estopped from treating it as fraudulent.<sup>6</sup> Thus, in the case last cited, the plaintiff subscribed for stock in the defendant bank in the names of his children, who for many years exercised acts of ownership over the stock and voted upon it, without objection on the part of the directors, and it was held that the corporation was thereby estopped from treating the subscription as if it was a fraudulent use, by the original subscriber, of mere names, to secure a greater number of votes than he would have been entitled to if the stock stood in his own name. If a subscription is fraudulently made, and by collusion between the subscriber and the directors, the subscriber will not be permitted to take advantage of such fraud to defeat the rights and interests of *bond fide* holders of stock or creditors of the corporation,<sup>7</sup> as a subscription is not only an undertaking to the company,

<sup>1</sup> McCully v. Pittsburgh, &c. R. R. Co., 32 Penn. St. 25; Creed v. Lancaster Bank, 1 Ohio St. 1; Rutland, &c. R. R. Co. v. Lincoln, 29 Vt. 206; Pittsburgh, &c. R. R. Co. v. Gazzam, 32 Penn. St. 340; Philadelphia, &c. R. R. Co. v. Cowell, 28 id. 329; Penobscot R. R. Co. v. Dummer, 40 Me. 172.

<sup>2</sup> Rutland, &c. R. R. Co. v. Lincoln, *ante*; Philadelphia, &c. R. R. Co. v. Cowell, 28 Penn. St. 329.

<sup>3</sup> Ogdensburgh, &c. R. R. Co. v. Frost, 21 Barb. (N. Y.) 541.

<sup>4</sup> State v. Lehre, 7 Rich. (S. C.) 234.

<sup>5</sup> State v. Smith, 48 Vt. 266; Creed v. Lancaster Bank, 1 Ohio St. 1.

<sup>6</sup> *Id.*

<sup>7</sup> Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46; Walker v. Devereaux, 4 Paige's Ch. (N. Y.) 229; Selma, &c. R. R. Co. v. Tipton, 5 Ala. 787; Hayne v. Beauchamp, 13 Miss. 516.

but with all other subscribers; and even if fraudulent, and made for the purpose of inducing subscriptions, it is to be enforced for the benefit of the others in interest; and a subscriber will not be permitted to set up as a defence that the subscription was a feigned and fraudulent one, and that the company was a party to the fraud.<sup>1</sup> And when a person subscribes for stock, he cannot exonerate himself from liability to the company therefor, by assignment of the same to another without the consent of the company, unless authorized so to do by statute or the articles of association; and he is liable for all assessments legally made on the shares,<sup>2</sup> as the capital stock of a corporation is treated as a trust fund for the benefit of its creditors.<sup>3</sup>

SEC. 28. **Absolute Subscriptions.** — cannot be changed by parol. — When the subscription is accepted, mutual rights are conferred; upon the part of the subscriber to have the shares, and upon the corporation to have the pay therefor, according to the terms of the subscription.<sup>4</sup> If the subscription is absolute in its terms, it cannot, in the absence of fraud, be contradicted by parol proof of an extrinsic agreement that it should not be demanded except upon a certain contingency;<sup>5</sup> or that it might be paid in work, instead of money;<sup>6</sup>

<sup>1</sup> *Graff v. Pittsburgh, &c. R. R. Co.*, 31 Penn. St. 489.

<sup>2</sup> *Buckfield, &c. R. R. Co. v. Irish*, 39 Me. 44; *Fay v. Lexington, &c., R. R. Co.*, 2 Met. (Ky.) 314; *City Hotel v. Dickinson*, 6 Gray (Mass.), 586; *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 336; *Dayton v. Borst*, 31 id. 435; *Northern R. R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Fort Edward, &c. v. Payne*, 17 id. 567; *Merrimac Mining Co. v. Levy*, 54 Penn. St. 227.

<sup>3</sup> *In re Bachman*, 12 Bankr. Reg. 223. And in case a corporation is being wound up, and its affairs are in the hands of a receiver, a shareholder, who is also a creditor under another contract, is not entitled to set off the debt due to him thereon against calls made by the receiver on his stock, nor to set off anticipated dividends against such calls. See *Brice's Ultra Vires*, 553; *Ex parte Henry Winsor*, 3 Story (U. S. C. C.), 411; *Cutler v. Mid-*

*dlesex Fac. Co.*, 14 Pick. (Mass.) 483; *McLaren v. Pennington*, 1 Paige (N. Y.), 752; *Osgood v. Ogden*, 4 Keyes (N. Y.), 10.

<sup>4</sup> *Marsh v. Burroughs*, 1 Wood (U. S. C. C.), 463.

<sup>5</sup> *Cedar Rapids, &c. R. R. Co. v. Willetts*, 15 Iowa, 456; *Roche v. Roanoke Classical Seminary*, 56 Ind. 198; *Jack v. Naber*, 15 Iowa, 450. But see *Evansville, &c. R. R. Co. v. Wright*, 38 Ind. 64. Any private agreement between the subscriber and the agent receiving the subscription, is wholly inoperative, whether it relates to not being called on to pay the subscription, — *Upton v. Tribilcock*, 91 U. S. 45; *Swartwout v. Michigan, &c. R. R. Co.*, 24 Mich. 389; *Syracuse, &c. R. R. Co. v. Gore*, 4 Hun (N. Y.), 392; *Graff v. Pittsburgh, &c. R. R. Co.*, 31 Penn. St. 489; *Blodgett v. Morrill*, 20 Vt. 510; *Robinson v. Pittsburgh, &c. R. R. Co.*, 32 Penn. St. 334; *Kennebec, &c. R. R. Co. v.*

<sup>6</sup> *Whitehall, &c. R. R. Co. v. Myers*, 16 Abb. Pr. n. s. (N. Y.) 34; *Ridgefield, &c. R. R. Co. v. Brush*, 43 Conn. 86.

or that the subscribers shall not be called upon to pay for the stock, or to pay assessments thereon;<sup>1</sup> because to permit such proof would impugn that universal and salutary rule, that a written contract can neither be added to nor subtracted from by proof of a parol contract altering or varying its terms, and would be a fraud on all subsequent subscribers.<sup>2</sup> But in Pennsylvania, proof of parol conditions is held to be admissible when they form a part of the *res gestæ*;<sup>3</sup> and the

Waters, 34 Me. 369; Roche v. Roanoke Classical Seminary, 56 Ind. 198, — or to any other matter. Thus, in an Indiana case the appellee was authorized by its charter to construct a railway from Lawrenceburgh to Indianapolis, by way of Greensburgh, with a branch from the latter place to Milford. The appellant, a citizen of Milford, made an unconditional subscription to the stock of the company, and paid it out, — the company promising that the branch should be made to Milford, which had not been done at the commencement of this suit. The appellant took and still holds his certificate of stock without any offer to cancel, or assign it to the company. Suit was brought by appellant to recover the money. It was held that the parol promise to construct the branch to Milford could not be proven as a part of the written contract of subscription; and hence, the money paid could not be recovered on the ground of a breach of contract. And also, that a recovery could not be had on the ground of fraud; the parol promise and representation being, under the circumstances, no more than the expression of an existing intention to make the branch. McAllister v. Indianapolis & Cincinnati R. R. Co., 15 Ind. 11. In Cairo, &c. R. R. Co. v. Parker, 84 Ill. 613, in an action on a note payable "when the track of said railroad shall be built" through a certain county, "and when the cars shall have run thereon," it was held that a further condition could not be engrafted thereon by parol, that such conditions were to have been performed in two years.

<sup>1</sup> Choteau Ins. Co. v. Floyd, 74 Mo. 286. In this case, a release from liability upon such subscription given by the directors, was held not to be of any avail in an action to recover the amount, thereof, because without consideration and in

fraud of the other stockholders and the creditors of the company. In Robinson v. Pittsburgh, &c. R. R. Co., 32 Penn. St. 334, it was held not to be a defence to an action upon a subscription, that the president of the corporation requested the defendant to make it, and that it was made with the understanding with him that the defendant was not to pay for or hold the stock subscribed, and that the same was to be cancelled.

<sup>2</sup> Robinson v. Pittsburgh, &c. R. R. Co., 32 Penn. St. 334; Connecticut & Passumpsic River R. R. Co. v. Bailey, 24 Vt. 465; Cunningham v. Edgefield, &c. R. R. Co., 2 Head (Tenn.), 23; North Carolina R. R. Co. v. Leach, 4 Jones (N. C.) L., 340; Thighen v. Mississippi Central, &c. R. R. Co., 32 Miss. 348; Madison, &c. Plank Road Co. v. Stearns, 6 Ind. 379; Kennebec & Portland R. R. Co. v. Waters, 34 Me. 369; Johnson v. Pensacola, &c. R. R. Co., 9 Fla. 299; Jack v. Naber, 15 Iowa, 450; Cedar Rapids, &c. R. R. Co. v. Willetts, 15 id. 450. But see Jewett v. Lawrenceburgh, &c. R. R. Co., 10 Ind. 539, where, when the original subscription was not produced, such evidence was held admissible; and such would doubtless be the case when the condition was omitted from the writing through the fraud of the company.

<sup>3</sup> In Rinesmith v. People's Freight R. R. Co., 90 Penn. St. 262, in an action for the amount of a subscription, the defendant alleged that it was expressly stipulated by the agent of the company, in the presence of S., that the defendant's subscription was not to be paid until a certain amount had been subscribed. The agent, on cross-examination, denied having made such representations. Defendant then called a witness to prove that the agent had made such representations, although they were made at a time previous to the subscrip-

representations of an agent may always be given in evidence to show the fraud by which subscriptions to the stock of a corporation were obtained, if such representations were a part of a scheme of fraud participated in by the officers of the corporation authorized to manage its affairs, or if the representations were such as the subscriber might reasonably presume the agent had authority to make.<sup>1</sup>

**SEC. 29. Conditional Subscriptions, — as to amount of Stock.** — There is now no question but that a subscriber may, at the time he subscribes to the capital stock of a railroad or other corporation, annex any reasonable and legal condition thereto, which must be performed in order to give validity thereto,<sup>2</sup> if there is nothing in the charter or general law which prohibits it;<sup>3</sup> and this is so, whether

tion. The court excluded the offer, and it was held that the testimony should have been admitted, as tending to corroborate the defendant, and as part of the *res gestæ*. *McCarty v. Salinsgrove*, &c. R. R. Co., 87 id. 332. But see *McClure v. People's Freight R. R. Co.*, 90 id. 269.

<sup>1</sup> *Custar v. Titusville Gas, &c. Co.*, 63 Pa. St. 381.

<sup>2</sup> *Oldtown, &c. R. R. Co. v. Veazie*, 39 Me. 571; *Penobscot, &c. R. R. Co. v. Dummer*, 40 id. 172; *Penobscot, &c. R. R. Co. v. Dunn*, 39 id. 587; *Penobscot R. R. Co. v. White*, 41 id. 512; *Somerset, &c. R. R. Co. v. Clarke*, 61 id. 379; *Belfast, &c. R. R. Co. v. Cottrell*, 66 id. 185; *Somerset, &c. R. R. Co. v. Cushing*, 45 id. 524; *Bucksport, &c. R. R. Co. v. Buck*, 68 id. 81; *Peoria, &c. R. R. Co. v. Preston*, 35 Iowa, 115; *Burlington, &c. R. R. v. Boestler*, 15 Iowa, 555; *Rhey v. Ebensburg, &c. Plank Road Co.*, 27 Penn. St. 261; *Cumberland Valley R. R. Co. v. Raab*, 9 Watts (Penn.), 458; *Chantiers, &c. R. R. Co. v. Hodgins*, 85 Penn. St. 501; *Fisher v. Evansville, &c. R. R. Co.*, 7 Ind. 407; *Milwaukee, &c. R. R. Co. v. Field*, 12 Wis. 340; *Penobscot, &c. R. R. Co. v. Bartlett*, 12 Gray (Mass.), 244; *Salem Mill Dam Co. v. Ropes*, 6 Pick. (Mass.) 23; 9 id. 187; *Worcester, &c. R. R. Co. v. Hinds*, 8 Cush. (Mass.) 110; *Stoneham Branch R. R. Co. v. Gould*, 2 Cush. (Mass.) 277; *Troy & Greenfield R. R. Co. v. Newton*, 8 id. 596; *Nutter v. Lexington, &c. R. R. Co.*, 6 id. 85; *Baile v. Calvert College, &c.*, 47 Md. 117; *Hughes v. Antietam Mfg. Co.*, 34 id. 316; *Little-*

*ton Mfg. Co. v. Parker*, 14 N. H. 543; *Contoocook, &c. R. R. Co. v. Barker*, 32 id. 363; *N. H. Central R. R. Co. v. Johnson*, 30 id. 390; *Allman v. Havana, &c. R. R. Co.*, 88 Ill. 521; *Shurtz v. Schoolcraft, &c. R. R. Co.*, 9 Mich. 269; *Selma, &c. R. R. Co. v. Anderson*, 51 Miss. 829; *Cooper v. McKee*, 53 Iowa, 239; *Santa Cruz R. R. Co. v. Schwartz*, 53 Cal. 106; *Richfield & N. Y. R. R. Co. v. Brush*, 43 Conn. 86; *Tower v. Detroit, &c. R. R. Co.*, 34 Mich. 328; *Stowell v. Stowell*, 9 Am. & Eng. R. R. Co. (Mich.) 598; *Paris, &c. R. R. Co. v. Henderson*, 89 Ill. 86; *Cauntwright v. Deeds*, 37 Iowa, 503; *B. C. & M. R. R. Co. v. Whitney*, 43 id. 113; *Courtright v. Strickler*, 37 id. 382; *Lamoille Valley R. R. Co. v. Marsh*, 49 Vt. 37; *Hanover Junction, &c. R. R. Co. v. Haldeman*, 82 Penn. St. 36; *North & South R. R. Co. v. Winfree*, 51 Ga. 318; *Emmitt v. Springfield, &c. R. R. Co.*, 31 Ohio St. 23; *Mansfield, &c. R. R. Co. v. Brown*, 26 id. 223; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Monroe v. Fort Wayne, &c. R. R. Co.*, 28 Mich. 272; *Cass v. Pittsburgh, &c. R. R. Co.*, 80 Penn. St. 31; *Ashtabula, &c. R. R. Co. v. Smith*, 15 Ohio St. 328; *Chamberlain v. Painesville, &c. R. R. Co.*, 15 id. 225.

<sup>3</sup> *Chamberlain v. Painesville, &c. R. R. Co.*, 15 Ohio St. 225; *Kirksey v. Florida, &c. R. R. Co.*, 7 Fla. 23; *Cumberland Valley R. R. Co. v. Raab*, 9 Watts (Penn.), 458; *Fort Edward, &c. Plank Road Co. v. Payne*, 15 N. Y. 583. A condition which contravenes the provisions of the charter, or which requires some act to be done by

the subscription is made under the supervision of commissioners, or of the officers of the company.<sup>1</sup> But, in order to prevent a recovery upon the subscription, it must amount to a condition precedent; that is, it must be of such a character as to show that the subscriber intended to make his liability to pay the sum subscribed dependent upon the performance by the corporation of some specific act or thing, and such must be the legal effect of the language. Thus, a subscription to the stock of a railroad company for a certain amount, with the words, "to be expended between the C. river and the east line of the State," was held not to be a condition precedent, but rather to amount to a direction or request as to the manner in which the money should be expended.<sup>2</sup> But a subscription which clearly shows that the subscriber intended to make his liability to pay dependent and conditional upon the doing of some specific act by the corporation, cannot be enforced until such condition is performed. Thus, if the subscription is for fifty shares, provided ten thousand shares are subscribed, or, that the company shall not organize or enter upon the enterprise contemplated until a certain number of shares are subscribed, such condition is a condition precedent, and the corporation cannot enforce the subscription until the condition is performed;<sup>3</sup> and where the charter fixes the capital stock, and provides that the full amount shall be subscribed, the taking up of the entire amount is a condition precedent to the enforcement of a subscription, the same as though it had been expressly written in the contract,—upon the ground that if this were not so, the proportional risk of a subscriber in the enterprise would be varied without his consent; because by fixing the capital, either by the legislature or the officers of the corporation, that amount is treated as essential to the success of the enterprise, and the subscribers cannot be held,

the corporation which it has no power to do, or which it is prohibited from doing, is void. *Peters v. Lincoln, &c. R. R. Co.*, 4 McCrary (U. S. C. C.), 269; *Pittsburgh, &c. R. R. Co. v. Woodrow*, 1 Pittsb. (Penn.) 450.

<sup>1</sup> *Pittsburgh, &c. R. R. Co. v. Stewart*, 41 Penn. St. 54; *New Albany, &c. R. R. Co. v. McCormick*, 10 Ind. 499; *Evansville, &c. R. R. Co. v. Sheuner*, 10 id. 244; *Jewett v. Lawrenceburgh, &c. R. R. Co.*, 10 id. 539; *Martin v. Pensacola, &c. R. R. Co.*, 8 Fla. 370. But in Pennsylvania it is held that as commissioners are

mere agents with limited powers, they have no power to annex conditions to a subscription, and can offer to subscribers no other terms than those prescribed by the legislature. *Bedford R. R. Co. v. Bowser*, 48 Penn. St. 29; *Pittsburgh, &c. R. R. Co. v. Biggars*, 34 id. 455; *Babington v. Pittsburgh R. R. Co.*, 34 id. 158.

<sup>2</sup> *Lane v. Brainerd*, 30 Conn. 565.

<sup>3</sup> *Penobscot & Kennebec R. R. Co. v. Dunn*, 39 Me. 587; *Philadelphia & Westchester R. R. Co. v. Hickman*, 28 Penn. St. 318; *Penobscot R. R. Co. v. White*, 41 Me. 512.

until *by raising the full amount*, the success of the enterprise is assured;<sup>1</sup> and when a condition is thus imposed by the statute, the legislature, by afterwards reducing the capital stock to the sum actually subscribed, cannot give validity to such prior subscriptions, because the condition, although only implied, is a part of the contract, which the legislature cannot impair.<sup>2</sup>

But, unless the charter, or general law, or the subscription itself expressly makes such a condition, or it is fairly implied from the language thereof, the raising of the full amount of the capital stock is not a condition precedent.<sup>3</sup> Where the amount of capital stock or the number of shares is not fixed by the charter, it may be fixed by the stockholders or directors;<sup>4</sup> but if the statute provides that the directors shall fix the number of shares, they must discharge this duty before an assessment can be laid;<sup>5</sup> but it seems that, although the proper method of fixing the number of shares is by a vote of

<sup>1</sup> In *Salem Mill Dam Co. v. Ropes*, 9 Pick. (Mass.) 187, the charter provided that the capital stock of the corporation should consist of five thousand shares, and that the whole number should be subscribed for before an assessment should be laid. Thirty shares out of the whole number were subscribed for by A. on account of B., but without authority; and it was held that under this state of facts, an assessment was not authorized, as the stock had not been fully subscribed for. In this case the question was raised, but not decided, whether, if a certain number of subscriptions had been made by persons who were *insolvent*, the assessment would be invalidated. But in *Penobscot R. R. Co. v. White*, 41 Me. 512, it was held not competent for a stockholder to show, for the purpose of avoiding a subscription under a similar condition, that a number of shares had been subscribed for by persons who were insolvent, unless it is also shown that the corporation acted in bad faith in receiving them. Upon the general question, see *Norwich, &c. Nav. Co. v. Theobald*, M. & M. 151; *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 240; *Somerset R. R. Co. v. Clarke*, 61 Me. 379; *N. H. Central R. R. Co. v. Johnson*, 30 N. H. 390; *Oldtown, &c. R. R. Co. v. Veazie*, 39 Me. 571; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Peoria, &c.*

*R. R. Co. v. Preston*, 35 Iowa, 115; *Fry v. Lexington, &c. R. R. Co.*, 2 Met. (Ky.) 314; *Dail v. Mt. Sterling Coal Road Co.*, 13 Bush (Ky.), 32; *Contoocook, &c. R. R. Co. v. Barker*, 32 N. H. 336.

<sup>2</sup> *Oldtown, &c. R. R. Co. v. Veazie*, ante.

<sup>3</sup> *City Hotel v. Dickinson*, 6 Gray (Mass.), 586; *Kennebec, &c. R. R. Co. v. Jarvis*, 34 Me. 360; *Willamette Freighting Co. v. Stanners*, 4 Oregon, 261; *York, &c. R. R. Co. v. Pratt*, 40 Me. 447; *Waterford, &c. R. R. Co. v. Dalbiac*, 6 Exchq. 443; *Lexington, &c. R. R. Co. v. Chandler*, 13 Met. (Mass.) 311; *Perkins v. Sanders*, 56 Miss. 533; *Somerset, &c. R. R. Co. v. Cushing*, 45 Me. 524; *Nutter v. Lexington, &c. R. R. Co.*, 6 Gray (Mass.), 85; *Boston, Barre, & Gardner R. R. Co. v. Wellington*, 113 Mass. 79; *Hunt v. Kansas, &c. Bridge Co.*, 11 Kan. 412; *Aronwick R. R. Co. v. Cady*, 11 R. I. 131; *Fox v. Allensville, &c. Turnpike Co.*, 46 Ind. 31; *Hoagland v. Cincinnati, &c. R. R. Co.*, 18 Ind. 452; *Hamilton, &c. Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 157.

<sup>4</sup> *Pike v. Bangor, &c. R. R. Co.*, 68 Me. 445; *Somerset, &c. R. R. Co. v. Cushing*, 45 id. 524.

<sup>5</sup> *Troy & Greenfield R. R. Co. v. Newton*, 8 Gray (Mass.), 596.

the directors, yet it may be done by voting to close the books when a certain number of shares have been taken, as that act indicates that they are satisfied that the number of shares represented on the books is sufficient.<sup>1</sup> When a charter provides that the capital stock shall not be more than a certain sum, nor less than a certain sum named, and the charter provides that an assessment may be laid when the minimum sum named in the charter is subscribed, it may be laid, although the number of shares to be raised has not been fixed by the directors.<sup>2</sup>

In all cases where a subscription is made upon condition that a certain amount of stock shall be subscribed for, it is necessary that *bond fide* subscriptions to that amount should be made by persons who are *at the time of subscribing* apparently solvent;<sup>3</sup> and must be unconditional, or the condition must be shown to have been performed or waived.<sup>4</sup> Indeed, such a condition requires that the subscriptions should all stand upon common ground, free from all conditions, and be binding upon the persons making them.<sup>5</sup> Consequently, a subscription which is payable in depreciated currency<sup>6</sup> or which is made by a contractor upon special and peculiar terms,<sup>7</sup> or which is colorable or fictitious,<sup>8</sup> cannot be included.

**SEC. 30. Kind of Conditions which may be imposed.** — As previously stated, any condition may be imposed by the subscriber which is reasonable in view of the enterprise contemplated, and which is not in contravention of the charter or any general law; and such conditions are binding upon the corporation, and unless performed are a defence to an action to recover the subscription;<sup>9</sup> and the burden is upon the company to show that it has substantially

<sup>1</sup> *Lexington, &c. R. R. Co. v. Chandler*, 13 Met. (Mass.) 311.

<sup>2</sup> *Penobscot R. R. Co. v. Bartlett*, 12 Gray (Mass.), 244; *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124.

<sup>3</sup> *Phillips v. Covington, &c. Bridge Co.*, 2 Met. (Ky.) 219; *Salem Mill Dam Co. v. Ropes*, 9 Pick. (Mass.) 187; *Monadnock R. R. Co. v. Felt*, 52 N. H. 379; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451; *Belfast, &c. R. R. Co. v. Cottrell*, 66 Me. 185.

<sup>4</sup> *Boston, Barre, & Gardner R. R. Co. v. Wellington*, 113 Mass. 79; *Troy &*

*Greenfield R. R. Co. v. Newton*, 8 Gray (Mass.), 569.

<sup>5</sup> *Salem Mill Dam Co. v. Ropes*, *ante*.

<sup>6</sup> *Cabot, &c. Bridge v. Chapin*, 6 Cush. (Mass.) 50.

<sup>7</sup> *Boston, &c. R. R. Co. v. Wellington*, 113 Mass. 79; *Oskaloosa, &c. Works v. Parkhurst*, 6 N. W. Rep. 235.

<sup>8</sup> *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 240.

<sup>9</sup> *Hanover Junction, &c. R. R. Co. v. Haldeman*, 82 Penn. St. 36; *Belfast, &c. R. R. Co. v. Moore*, 60 Me. 561; *Burke v. Smith*, 16 Wall. (U. S.) 390; *Henderson, &c. R. R. Co. v. Leavell*, 16 B. Mon. (Ky.) 358.

performed the condition;<sup>1</sup> and the subscriber does not become a member of the corporation until such condition is performed.<sup>2</sup>

Of course, a condition, in order to be operative, must have been made when the stock was subscribed for, or else it must be shown that it was subsequently made *with the consent of all the parties*;<sup>3</sup> and it is valid, although made in a distinct writing from that containing the subscription itself, *unless it operates as a fraud upon the other subscribers*;<sup>4</sup> and, if there is no proof as to when the condition was made, it will be presumed to have been made at the time of subscribing.<sup>5</sup>

SEC. 31. **Condition as to Location.** — A condition contained in a subscription to the stock of a railroad company, that the road shall be located over a certain route, is valid, and the subscription cannot be enforced if the condition is not complied with, — subject to the provision that the location designated is within the purview of the charter.<sup>6</sup> And a contract to pay money as a gratuity in considera-

<sup>1</sup> Pittsburgh, &c. R. R. Co. v. Hickman, 28 Penn. St. 318; People's Ferry Co. v. Balch, 8 Gray (Mass.), 303; Monadnock R. R. Co. v. Felt, 52 N. H. 379; Bucksport, &c. R. R. Co. v. Buck, 65 Me. 536; Ridgefield, &c. R. R. Co. v. Reynolds, 46 Conn. 375; Chase v. Sycamore, &c. R. R. Co., 38 Ill. 215; Union Hotel Co. v. Hersee, 15 Hun (N. Y.), 371; Santa Cruz R. R. Co. v. Schwartz, 53 Cal. 106; People v. Holden, 82 Ill. 93. And according to some of the cases, it is held that the subscriber is entitled to notice that the condition is performed before action is brought. Chase v. Sycamore, &c. R. R. Co., *ante*. But it is not believed that this doctrine is accurate, as the question as to whether the condition has been performed or not is one of fact, which the corporation takes the risk of being able to establish, or of failing in its suit. New Albany, &c. R. R. Co. v. McCormick, 10 Ind. 499; Brudlove v. Martinsville, &c. R. R. Co., 12 id. 114; Jewett v. Lawrenceburgh, &c. R. R. Co., 10 id. 539; Evansville & Indianapolis R. R. Co. v. Shearer, 10 id. 244; Shearer v. Evansville, &c. R. R. Co., 12 id. 452.

<sup>2</sup> McMillan v. Maysville, &c. R. R. Co., 15 B. Mon. (Ky.) 218; Chase v. Sycamore, &c. R. R. Co., *ante*.

<sup>3</sup> N. H. Central R. R. Co. v. Johnson,

30 N. H. 390. It would seem that the commissioners may consent to a subsequent condition. Thus in Montpelier, &c. R. R. Co. v. Langdon, 45 Vt. 137, the defendant on the 19th of January, 1869, subscribed for one hundred shares in the defendant road, of one hundred dollars each. At a legal meeting of the commissioners of the corporation held Dec. 29th prox., the defendant in the presence of the commissioners annexed to his subscription the following condition: "Condition that responsible individuals of Montpelier shall subscribe fifty thousand dollars, within one year from above date, and a list of subscribers and amount of each given me January 19, 1870." It was held that the true meaning of this condition was that the defendant's subscription — he being a resident of Montpelier — was to be counted towards the fifty thousand dollars named therein.

<sup>4</sup> White Mountain R. R. Co. v. Eastman, 34 N. H. 124.

<sup>5</sup> Robinson v. Pittsburgh, &c. R. R. Co., 32 Penn. St. 334.

<sup>6</sup> Nashville, &c. R. R. Co. v. Baker, 2 Cold. (Tenn.) 574; Charlotte, &c. R. R. Co. v. Blakely, 3 Strobb. (S. C.) 245; Miller v. Pittsburgh, &c. R. R. Co., 40 Penn. St. 237; Burlington, &c. R. R. Co. v. Boestler, 15 Iowa, 555; Swartwout v.



tion that a railway corporation will locate its road over a certain route or to a certain point, is valid and binding, and is predicated upon a sufficient consideration, and is not opposed to public policy unless the public interest is sacrificed by it.<sup>1</sup> But in New York, under a char-

Michigan Air Line R. R. Co., 24 Mich. 389; Des Moines Valley R. R. Co. v. Graff, 27 Iowa, 99; Woonsocket, &c. R. R. Co. v. Sherman, 8 R. I. 564; Warner v. Callender, 20 Ohio St. 190; Smith v. Allison, 23 Ind. 366; Brownlee v. Ohio, &c. R. R. Co., 18 Ind. 68; North Missouri R. R. Co. v. Winkler, 29 Mo. 318; North Missouri R. R. Co. v. Miller, 34 id. 19; Buffalo, &c. R. R. Co. v. Pottle, 23 Barb. (N. Y.) 21; Jewett v. Lawrenceburgh, &c. R. R. Co., 10 Ind. 539; McMillan v. Maysville, &c. R. R. Co., 15 B. Mon. (Ky.) 218; Chamberlain v. Painesville, &c. R. R. Co., 15 Ohio St. 225; Ashtabula, &c. R. R. Co. v. Smith, 15 Ohio St. 328; Paris, &c. R. R. Co. v. Henderson, 89 Ill. 86; Cooper v. McKee, 53 Iowa, 239; Detroit, &c. R. R. Co. v. Starnes, 38 Mich. 698; Henderson, &c. R. R. Co. v. Leavell, 18 B. Mon. (Ky.) 358; Martin v. Pensacola, &c. R. R. Co., 8 Fla. 370; Trott v. Sarchett, 10 Ohio St. 241; Mansfield, &c. R. R. Co. v. Brown, 26 Ohio St. 223; Parks v. Evansville, &c. R. R. Co., 23 Ind. 567; Parker v. Thomas, 19 Ind. 213; Rhey v. Ebensburgh, &c. Plank Road Co., 27 Penn. St. 261; Cumberland Valley R. R. Co. v. Baub, 9 Watts (Penn.), 458; Caley v. Philadelphia, &c. R. R. Co., 80 Penn. St. 363; Bucksport, &c. R. R. Co. v. Brewer, 67 Me. 295; Merrill v. Reeves, 50 Iowa, 504; Agricultural, &c. R. R. Co. v. Winchester, 13 Allen (Mass.), 29; First National Bank v. Hurford, 29 Iowa, 579; Spartanburgh, &c. R. R. Co. v. Graffenried, 12 Rich. (S. C.) 275; Taggart v. Western Md. R. R. Co., 24 Md. 563; Racine Co. Bank v. Ayres, 12 Wis. 512; Michigan Midland & Canada R. R. Co. v. Bacon, 33 Mich. 466; Iowa, &c. R. R. Co. v. Bliobenes, 41 Iowa, 267; Toledo, &c. R. R. Co. v. Johnson, 49 Mich. 148; Cayuga Lake R. R. Co. v. Kyle, 5 T. & C. (N. Y.) 659; Cedar Rapids &c. R. R. Co. v. Spofford, 41 Iowa, 292; Berryman v. Cincinnati Southern R. R. Co., 14 B. Mon. (Ky.) 755; Moore v. Hanover Junction R. R.

Co., 94 Penn. St. 324; Crane v. Indiana, &c. R. R. Co., 59 Ind. 165.

<sup>1</sup> In *First National Bank of Cedar Rapids v. Hendrie*, 49 Iowa, 402; 31 Am. Rep. 153, the defendant gave his notes for specific sums to secure the construction of the Cedar Rapids & Missouri Railroad, from Cedar Rapids to Council Bluffs. As located, the road reached the Missouri River many miles north of Council Bluffs; but the officers of the corporation informed the citizens of Council Bluffs that if sufficient inducements were offered by way of contributions by them, the route should be changed so as to strike the river at that city; and, in pursuance of that proposition, the notes in suit were executed, and the road was built to Council Bluffs. Payment was resisted upon the ground that the notes were given under a contract which was void, as being opposed to public policy. But the court held otherwise, Beck, J., saying: "Counsel for defendants insist that corporations organized for building and operating railroads are public in their character, and are charged with duties which require them to construct and operate their roads so as best to serve the interests of the public. In the application of the principle it is insisted that railroads ought to be located in view of the public interest, and that their location should not be changed to promote the interest of the corporations or their officers. If we admit these propositions to be sound, we are not prepared to concede that this case is brought within the rules advocated by counsel. It is not made to appear that the public interest did not demand the construction of the road to Council Bluffs, and that its first location to another point on the Missouri River was in conflict with public policy, and the change of location was therefore required by the duty and obligation of the corporation as understood by counsel. Whatever may have been the motive of the corporation in making the change of location, it surely appears to have been in accord with

ter authorizing absolute subscriptions for the construction of a public highway, subscriptions conditional on the adoption of a particular locality or terminus have been held to be void, as being opposed to public policy, in that they tend to induce a location which will subserve private interests to the detriment of the public, and operate as a fraud upon absolute subscribers;<sup>1</sup> and this rule has been

the public interest. We may judicially take notice of the location, history, and population of the city of Council Bluffs, and also of the fact that the terminus of the road at the Missouri River, first proposed, was at a point of very inconsiderable importance. The interest of the public would be better served by the road terminating at the largest town upon the Missouri River within the borders of the State, rather than at a point where no town or city was built. The connection which the road would have at Council Bluffs with other railroads was also a matter of public concern, and should have influenced the choice of that city as a terminal point. It follows that the construction of the road to Council Bluffs was not in conflict with public policy. But counsel contend that the payment of money by the parties interested to secure the location of the road as demanded by the public interest is in conflict with public policy; in other words, that the corporation cannot receive money as a gratuity for the construction of its railroad to Council Bluffs. But this court has sustained statutes authorizing taxes in aid of railroad corporations to be voted by the people, on condition that their roads were built through the town or township where the vote was had. *Stewart v. Supervisors of Polk County*, 30 Iowa, 9. Notes and contracts conditioned for the payment of money upon the completion of railroads to points indicated have been held to be supported by sufficient consideration. *Des Moines Valley R. R. Co. v. Graff*, 27 id. 99; *First National Bank of Cedar Rapids v. Hurford*, 29 id. 579; *Burlington, &c. R. R. Co. v. Palmer*, 42 id. 222. We conclude that under the decisions of this court, the contract upon which the notes in suit were given are not in conflict with public policy." *Rose v. San Antonio, &c. R. R. Co.*, 31 Tex. 49; *Carlisle v. Terre Haute R. R. Co.*, 6 Ind. 316; *Michigan, &c. R. R. Co. v. Corbett*,

33 Mich. 458; *Cumberland Valley R. R. Co. v. Baub*, 9 Watts (Penn.), 458; *Cedar Rapids &c. R. R. Co. v. Spofford*, 41 Iowa, 292; *Berryman v. Cincinnati, &c. R. R. Co.*, 14 Bush (Ky.), 775; *Michigan, &c. R. R. Co. v. Bacon*, 33 Mich. 466; *McClure v. Missouri, &c. R. R. Co.*, 9 Kan. 373. An action was brought upon a railway subscription, conditioned to be paid in instalments, as might from time to time be called for by the directors, provided the same should be expended upon a certain line of road to be thereafter located by the company. It was held that the petition, showing neither the road constructed nor an offer nor readiness to expend the money subscribed, according to the condition, was defective; that upon a demurrer by the plaintiff to an answer to such petition, such defects in the petition require such demurrer to be overruled. *Trott v. Sarchett*, 10 Ohio St. 241. If a railway company is authorized to build its road in three sections, and, after the completion of the first section, subscriptions are obtained for the second and third together, the same may be collected, although it does not appear where or how they are to be expended. *Agricultural Branch R. R. Co. v. Winchester*, 13 Allen (Mass.), 29. In another case the act incorporating a company required it to commence work as near simultaneously as possible in sections, and provided that the subscribers might designate the section on which they desired their subscriptions to be used. On an action upon the subscription of a stockholder, it was held that it was no defence that the company had abandoned work on one section, and had determined to appropriate the funds of the company on another section. *Vicksburg, Shreveport, & Texas R. R. Co. v. McKean*, 12 La. An. 638.

<sup>1</sup> *Butternuts v. Oxford Turnpike Co.*, 1 Hill (N. Y.), 518; *Fort Edward, &c. Turnpike Co. v. Payne*, 15 N. Y. 583.

applied in the case of railroads;<sup>1</sup> but this doctrine is believed to be unsound, and is not followed in other States, and, if generally applied, would often result disastrously to this species of enterprise. It is a relic of the old and untenable doctrine relative to the powers of corporations, which is repudiated by the progressive spirit of the law, and the utter fallacy of which has been demonstrated by experience.<sup>2</sup> Even though no condition is expressed in the subscription, yet, if the charter or the subscription-paper itself fixes the route, *any material change therein* releases the subscriber from his obligation to pay.<sup>3</sup> Where there is a condition as to the route, and there is a variation therefrom in the final construction of the road, the subscriber may show that *as to him the variation is material*. Thus, a contract of subscription to stock provided for the building of a railroad, according to the survey made by a certain railroad company. The original route ran within five hundred feet of the defendant's mill; but after the subscription was made, the route was changed so that the road was 1200 feet from the mill. He contended that this change was material; that it was the location of the original survey which induced his subscription; and that his interests were seriously compromised by the alteration: and the court rejected the evidence. It was held that the court erred, and that he should have been permitted to show that the alteration in the route was as to him a material variation.<sup>4</sup> If the route is fixed by the charter, although the contract of subscription is silent

<sup>1</sup> *Utica, &c. R. R. Co. v. Brinckerhoff*, 21 Wend. (N. Y.), 139.

<sup>2</sup> See upholding the validity of such contracts, in addition to the cases already cited, *Troy, &c. R. R. Co. v. Newton*, 1 Gray (Mass.), 544; *Bucksport, &c. R. R. Co. v. Brewer*, 67 Me. 295; *Roberts v. Mobile, &c. R. R. Co.*, 32 Miss. 373; *Belfast, &c. R. R. Co. v. Moore*, 60 Me. 561; *Taylor v. Fletcher*, 15 Md. 80.

<sup>3</sup> *Caley v. Philadelphia & Chester Co. R. R. Co.*, 80 Penn. St. 363. By the terms of a contract between W. and a railway company, he became bound to pay the latter fifteen hundred dollars if within a specified time it should have completed its road to West Union and have done half the grading between that place and the point of intersection with the M. & St. P. Railway. It was held that the company had not complied with the contract by

completing the road between West Union and the point of intersection named, while it failed to construct its road to West Union from the other direction, and that the road must have been completed to West Union on the one side and half the grading done on the other. *B. C. R. & M. R. R. Co. v. Whitney*, 43 Iowa, 113. As to the construction to be put upon conditions, see *Hanover Junction, &c. R. R. Co. v. Haldeman*, 82 Pa. St. 36; 15 Am. R'y Rep. 442; *Emmitt v. Springfield, &c. R. R. Co.*, 31 Ohio St. 23; 16 Am. R'y Rep. 266; *Mansfield, Coldwater, & Lake Michigan R. R. Co. v. Brown*, 26 Ohio St. 223; 13 Am. R'y Rep. 341; *North & South R. R. Co. v. Winfree*, 51 Ga. 318; *Lamoille Valley R. R. Co. v. Marsh*, 49 Vt. 37.

<sup>4</sup> *Moore v. Hanover Junction R. R. Co.*, 94 Penn. St. 324.

in that respect, any material variation therefrom invalidates the subscription;<sup>1</sup> and a subscription-paper which sets out the *termini* of a railway, and the route over which it will be constructed, operates as a contract that the *termini* and the route shall be as stated; and if the company materially changes them, a subscriber will be released. Thus, a railway company took subscriptions for its road, with specified route and *termini*; it passed a resolution changing them in material points; and it was held that this was evidence of abandonment of the route in the subscription.<sup>2</sup>

But there need not be a literal compliance with the provisions of the statute; it will be sufficient if the statute is substantially answered in that respect.<sup>3</sup> And this is the case even where, after the subscription is entered into, a relocation of the road is made. Thus, a railway company, having filed a location in which the line was divided into three divisions, and in which a portion, extending to a point in the town of P., was designated as the first division, was subsequently empowered by statute to build its road in sections, and the road was so built; afterwards a new location was filed, in which the line was not divided into sections, and no point in the town of P. was indicated as the end of the first section. In an action by the company to recover assessments against one who, before the relocation, had subscribed for stock in the first section, it was held that the failure to fix the end of the first section in the relocation did not release the stockholder.<sup>4</sup>

A change of terminus, which it is within the power of the corporation to make, where the contract of subscription does not expressly contain anything which makes the validity of the subscription dependent upon the construction of the road to a particular point, will not invalidate the subscription,<sup>5</sup> or a note even, given as a gratuity in aid of the enterprise, although the change was made to injure a subscriber to the capital stock;<sup>6</sup> because in

<sup>1</sup> This is upon the ground that the charter is treated as forming a part of the contract, and the parties are presumed to contract with reference to its provisions. *Burrows v. Smith*, 10 N. Y. 550; *Buckfield, &c. R. R. Co. v. Irish*, 39 Me. 44; *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 435; *Oldtown, &c. R. R. Co. v. Veazie*, 39 Me. 579.

<sup>2</sup> *Caley v. Philadelphia & Chester Co. R. R. Co.*, 80 Pa. St. 363.

<sup>3</sup> *Cayuga Lake R. R. Co. v. Kyle*, 5 T. & C. (N. Y.) 569.

<sup>4</sup> *Boston, Barre, & Gardner R. R. Co. v. Wellington*, 113 Mass. 79.

<sup>5</sup> *Jewett v. Valley R. R. Co.*, 34 Ohio St. 601.

<sup>6</sup> *Greenville, &c. R. R. Co. v. Johnson*, 8 Baxter (Tenn.), 332; *Whitehall, &c. R. R. Co. v. Myers*, 16 Abb. Pr. (N. Y.) N. s. 34.

such cases the subscription is absolute, and the officers are to be allowed to follow their own judgment in carrying out the enterprise, so long as they keep within the purview of the powers conferred upon the corporation. But if the charter or articles of association, or the subscription-paper itself, expressly contemplates the construction of a railroad by the corporation from a certain point to another, both of which are designated, it has been held that the building of a road for part of the way and leasing another road for the balance, is not a compliance with the condition. Thus, a subscription bound the maker to pay three hundred dollars upon the completion of a certain railroad. The articles of incorporation described the initial point of the road as G. The road was built within three and a half miles of G., and there connected with another railroad, over which its trains were run to G., and it was held that this was not a compliance with the condition;<sup>1</sup> and a similar doctrine was held in a later case in that State,<sup>2</sup> where the company leased a part of its line of another company. But in Illinois it has been held that where the condition was that the road should be completed and in operation between two towns named, within five years; and within three years it was completed to within a mile, as to one of the towns; and from that time, by connecting with the track of another road over that mile, ran its trains and supplied all the demands of the travelling public between the two towns,—there was a substantial compliance, and the subscription was collectible.<sup>3</sup>

But where the condition was that the road should be completed and in operation to M. by a certain time, and it appeared that there was a large township by that name, and a village of the same name which had a well-known existence, though not incorporated, it was held that the court might determine whether the township or the village was intended; and that a ruling that the village was meant was correct.<sup>4</sup>

A condition that a depot should be located within three-fourths of a mile of the corporate limits of the town of C., was held to be complied with by locating a depot within that distance measuring by a straight line, though the side tracks and switches were not.<sup>5</sup>

A subscription payable on condition "that a depot be established

<sup>1</sup> *Cooper v. McKee*, 53 Iowa, 239.

<sup>2</sup> *Lawrence v. Smith*, 57 Iowa, 701.

<sup>3</sup> *People v. Holden*, 82 Ill. 93.

<sup>4</sup> *Ogden v. Kirby*, 79 Ill. 555.

<sup>5</sup> *Courtright v. Strickler*, 37 Iowa, 382.

within eighty rods of the present town of W.," was held to be governed by the recorded plat of the town at the date of the note, and not by a subsequent extension of the town limits.<sup>1</sup>

But where such a condition provided for a payment to be made when the road should intersect with another at W., and should be "permanently located to and within the limits of the town of W., with a station at the same," it was held that a construction of the road through the town, and of the depot just outside of its limits, was not a compliance with the terms of the contract.<sup>2</sup> But an action will not be defeated, upon a subscription with a condition that the subscriber will pay "as soon as the cars shall run to B. upon a completed railroad from B.," by the circumstance that the company does not own the rolling stock by which the road is operated;<sup>3</sup> nor, if the charter expressly provides that it may make leased roads a part of its line; because in that case, the charter being deemed to be a part of the contract, the leasing of such links in its route would doubtless be treated as a building of the road contemplated, within the meaning of the contract.

**SEC. 32. Condition as to Time.**—So also, conditions relating to the time within which the road or a part thereof shall be constructed or put under contract are not only valid, but must be substantially complied with to render the subscription operative.<sup>4</sup> But in order to have the effect of a condition precedent, such intention must clearly appear from the language used. Thus, where by the terms of a promissory note the maker undertook to pay a certain sum to a railway company two years after its trains should be running to a point specified, in consideration of the construction of the line and the opening of a certain street within sixty days, *held*, that the failure to construct the road and open the street within sixty days did not relieve the payer from the obligation of payment.<sup>5</sup> So where in a written instrument the obligor became bound to pay a certain sum of money to a railway company when the line should be completed and the cars running between designated points, the words, "the road to be finished by September 1, 1872," were held not to imply a condition precedent. The obligor was not released from

<sup>1</sup> Davenport, &c. R. R. Co. v. Rogers, 39 Iowa, 298.

<sup>2</sup> Davenport, &c. R. R. Co. v. O'Conner, 40 Iowa, 477.

<sup>3</sup> Courtright v. Deeds, 37 Iowa, 503.

<sup>4</sup> Burlington, &c. R. R. Co. v. Boestler, 15 Iowa, 555; Connecticut & Passumpsic River R. R. Co. v. Baxter, 32 Vt. 805.

<sup>5</sup> Traer v. Stuart, 46 Iowa, 15.

payment by the fact that the road was not completed at the time fixed in the instrument.<sup>1</sup>

In an Illinois case,<sup>2</sup> in an action upon a note given to a railroad company, to be paid "when the track of said railroad shall be laid through White County, and cars shall run thereon," the defendant pleaded that the sole consideration was that such road should be built within three years from the date of the note, and averred that such road was not built within three years, etc. It was held that the circuit court erred in overruling a demurrer to the defendant's plea. The plea was bad on general demurrer. Nothing will be imported into these conditions beyond what they express upon their face. The parties having undertaken to put in writing the terms upon which they have contracted, they are bound by the writing and no presumptions will be raised in their favor, beyond those which the writing clearly sustains. If the condition is to pay if the road is completed by a certain time, substantial compliance therewith must be shown,<sup>3</sup> and a mere colorable compliance with the condition will not suffice. Thus, where a subscription was made upon the condition that the road should be built, equipped, and trains running to a given point by a certain day, it was held that the fact that the company ran an engine, tender, and one passenger car, and one or two flat cars over the road two days before the time limited, but places on the road were only half tied, and regular trains were not run over the road until several months after, did not show a compliance with the condition which bound the subscriber to pay his subscription.<sup>4</sup>

<sup>1</sup> *Davis v. Cobban*, 39 Iowa, 392; 20 Am. Ry. Rep. 83.

<sup>2</sup> *Cairo, &c. R. R. Co. v. Delap*, 7 Brad. (Ill.) 60.

<sup>3</sup> *C. D. & M. R. Co. v. Schewe*, 45 Iowa, 79; *Chartiers R. R. Co. v. Hodgins*, 85 Penn. St. 501; *Stowell v. Stowell*, 9 Am. & Eng. R. R. Cas. (Mich.) 598.

<sup>4</sup> *Paris, &c. R. R. Co. v. Henderson*, 89 Ill. 86. In an action upon a contract which stipulated that the obligor would pay a certain sum to a railway company, on condition that the company would build, equip, and run a train of cars over a railroad between given points, by a certain time, running on the east line of the obligor's land, the complaint alleged the building of the road between the points within the time named, and the running

of the train, and that the track was constructed "upon, or as near as practicable upon, the east line of the lands owned by said defendant, and at all points within fifty feet of said east line," alleging no reason for not building the track on the east line, and no waiver of that condition. It was held that the complaint was bad in not showing performance of the condition precedent. *Crane v. Indiana North & South Ry. Co.*, 59 Ind. 165. Where a subscription in aid of a railway is subject to a condition that the railroad shall be completed and in operation between two certain points by a day named, if a substantial performance of those conditions is shown, proof that a depot was not built, and a station agent appointed for such place by the day named, will not neces-

**SEC. 33. Construction of Conditions.** — Conditions annexed to a subscription will be construed according to the intention of the parties, — to be gathered from the subscription as applied to the subject matter to which it relates. Thus, in a Vermont case<sup>1</sup> a subscription provided that the money subscribed should be expended in the construction of the road from St. Johnsbury, Vt., to Derby Line, and also that it should not be binding until the whole road from St. Johnsbury to Derby Line should be put under contract for grading. It was held that this was not a mere description of the road, requiring the whole to be put under contract before the subscription was payable, but that it created an express condition to the validity of the subscription, that the road should be put under contract as far north as Derby Line; and that the term "Derby Line," in the absence of any evidence as to its meaning, except the subscription itself and the fact that the charter fixed the northern terminus in the north line of Derby, must be construed to mean the north line of Derby. But the defendant having shown that the words "Derby Line," in common usage, meant a village of that name in Derby, it was held that it became a question of fact for the jury

sarily defeat a recovery on the subscription. *Ogden v. Kirby*, 79 Ill. 555. And the same principle was applied where the railroad was not completed until two and a half months after the time specified. *Des Moines Valley R. R. Co. v. Graff*, 27 Iowa, 99. A voluntary subscription in aid of a proposed railroad, when accepted and the road completed in accordance with the conditions of the promise, becomes a valid and binding contract. And if such a promise is made to an existing company, its successors, or assigns, the completion of the road by its successor, to whom it has assigned all its franchises and property, including such subscription, will enable the latter to enforce the promise in its own name; the building and opening of the road is the essence of the agreement. *Michigan, &c. R. R. Co. v. Bacon*, 33 Mich. 466; *Scotland County v. Thomas*, 94 U. S. 682. In *Strangham v. Indianapolis, &c., R. R. Co.*, 38 Ind. 185, in an action upon a subscription-paper, the complaint set out the contract, which was as follows: "Ten days after the completion of the I. and St. L. railroad from I. H. county, and the running of a train of cars

thereon, I promise to pay to the order of said railroad company, at the bank of D., the sum of one hundred dollars, without any relief whatever from valuation or appraisal laws. The consideration of this note is, the construction of said road as aforesaid, within one-half mile of the town of D., and the promise and agreement of said company that by means of said road and its connections, the company will run trains through from I. L., within two years from the first day of January, 1869," — dated November 25, 1868, and signed by the defendant, — and averred performance within the time and in the manner mentioned.

It was held that the contract, being capable of performance within one year, was not within the statute of frauds and that if the contract had originally been within the statute, and therefore not binding on the plaintiff, yet *after performance by the company*, the maker could not defend on the ground that he alone had signed the instrument.

<sup>1</sup> *Conn. & Pass. River R. R. Co. v. Baxter*, 32 Vt. 305; *People v. Holden*, 82 Ill. 93.



to determine which point was meant by the term. And for this purpose parol evidence was admitted to show that the route adopted, terminating in the north line of Derby, and not at Derby Line village, was more feasible, and better for the company and for the public, than any route leading to that village. And it was held that if the plaintiff's agent who obtained the subscription represented that the route intended by the written condition was the one terminating at Derby Line village, and the defendant subscribed in reliance upon such representation, the plaintiff was bound thereby, whether such representation was made fraudulently or not.

The terms of subscription to aid in the construction of a railway contained a stipulation that the money should be paid "in instalments of five per cent so long as the work should be in actual progress," and that if the railway company named should fail to construct the road, then the amount subscribed should be paid on the same terms and conditions to any other company which would grade and tie a road between the points designated. It was held that the grading and tying were not conditions precedent to the payment of the subscription.<sup>1</sup> A subscription to be paid when the road "is completed," is held to be payable when the road is put in a condition for regular business,<sup>2</sup> and the question as to whether it has been so completed is one of fact for the jury.<sup>3</sup>

A subscription was made under a condition that if the plaintiff's railroad should be permanently located and constructed through Lexington, "we will pay the sums set opposite our names, in equal instalments, at six, twelve, and eighteen months from the 1st of July, 1873, unto Thomas Mitchell as trustee . . . to be used and applied by him only towards paying the damages, costs, &c. in acquiring the right of way, &c." It was held that the completion of the road was not a condition precedent to the payment of the money subscribed.<sup>4</sup>

A railway company being about to construct its line through a town, the citizens, among whom was one A., agreed to subscribe to the company \$150,000, of which A. agreed to pay \$500, and also to

<sup>1</sup> *Iowa Northern Central Railway Co. v. Bliobenes*, 41 Ia. 267. Voluntary subscriptions in aid of a proposed railway, when accepted, and the road is constructed in accordance with the conditions of the promise, become valid and binding contracts. *Michigan, Midland, & Canada R. R. Co. v. Bacon*, 33 Mich. 466.

<sup>2</sup> *Tower v. Detroit, Lansing, & Lake Michigan R. R. Co.*, 34 Mich. 328.

<sup>3</sup> *Toledo, &c. R. R. Co. v. Johnson*, 49 Mich. 148.

<sup>4</sup> *Berryman v. Cincinnati, &c. R. R. Co.*, 14 Bush (Ky.), 755.

furnish suitable depot grounds. The company undertook to complete its road in one year. Subsequently the citizens provided depot grounds which proved unsuitable, and it was thereupon agreed that they should buy other grounds, and that the amount paid therefor by each citizen should be credited on his subscription. A. paid his whole \$500 to buy depot grounds, the title to which afterwards became vested in the company. Subsequently, the company having failed to complete its road within the time stipulated, A. brought suit against it to recover his \$500. It was held that there was no new contract substituted for the old one, and that the company was not released from its obligation to complete the road in the time specified, and, therefore, that the plaintiff was entitled to recover.<sup>1</sup>

In an Iowa case,<sup>2</sup> a contract of subscription bound the defendant to pay a certain sum to a railroad company upon the construction of its road to a depot, to be located within three-fourths of a mile of the corporate limits of the town of C., for which defendant was to receive certificates of stock. By a subsequent contract he surrendered his certificates of stock on condition that the company should construct its road by D. to said town of C. It was held that under proper construction of these contracts, defendant was liable on completion of the road to a depot located within the distance of the corporate limits stipulated in the original contract. In determining the distance mentioned, the measurement should be by a straight line from the corporate limits to the depot; and if the depot is in the prescribed limit, it is sufficient, though all the side-tracks and switches are not. And it was held that under such a subscription, the jury were properly instructed that the point from which measurement is to be made, in order to determine whether the depot is built within the distance prescribed, must be the corporate limits of the town, without regard to buildings or improvements.

In a Texas case,<sup>3</sup> a railway company obligated itself to locate its depot at *the nearest practicable point* within one mile of the court-house, and it was held that the word "*practicable*," as used by the parties, was not synonymous with "*possible*," and that the company was only bound to locate its depot at the nearest point within one mile of the court-house at which it could be located with reasonable and proper cost, with reference to all the circum-

<sup>1</sup> Texas & Pacific R. R. Co. v. Fitch,  
12 Am. & Eng. R. R. Cas. (Tex.) 312.

<sup>2</sup> Courtright v. Strickler, 37 Iowa, 382.

<sup>3</sup> Wooters v. International, &c. R. R.  
Co., 54 Tex. 294.

stances, and in view of the objects and purposes inducing the contract. But where the road or depot is to be located within a certain distance of a given point, the distance is not to be measured by the travelled way, but in a straight line from the point designated.<sup>1</sup>

A stipulation to locate a road and station "within the limits" of a town is not met by the location of a station just outside the limits of the town.<sup>2</sup> A subscription containing a condition that the road shall be located through a certain town, becomes absolute upon the location of the road through such place, and payment then becomes due, although the road has not been constructed.<sup>3</sup>

Where a subscription was made for stock in a railway company, payable at such times and in such instalments as the directors may prescribe, provided the road is "permanently located" on a given route, and that a "freight-house and depot be built" at a point named, it was held, (1.) that on the permanent location of the road, in accordance with the terms proposed, the subscription became absolute; (2.) that the provision in relation to the erection of the buildings was a stipulation merely, and its performance was not a condition precedent to the right to collect the amount of the subscription; (3.) that the giving, by a subscriber, of his note for the balance of his subscription, and taking, therefor, from the company, a receipt stipulating that, when paid, the amount of the note should be applied on his stock, was *prima facie* a waiver of conditions precedent.<sup>4</sup> Where a subscription was made to the capital stock of a railroad company, upon condition that the final location of the road should be upon a certain route, the permanent location of the road contemplated by the contract was held to be the adoption by the directors of the route mentioned.<sup>5</sup>

So where railroad stock was subscribed for, with a proviso that the "road shall be built" in a specified locality, the permanent location of the road in the place designated was held to be a sufficient

<sup>1</sup> Cedar Falls, &c. R. R. Co. v. Rich, 33 Iowa, 113.

<sup>2</sup> Davenport, &c. R. R. Co. v. O'Connor, 40 Iowa, 477.

<sup>3</sup> Mansfield, &c. R. R. Co. v. Stout, 26 Ohio St. 241; Parker v. Thomas, 28 Ind. 277; McMillan v. Maysville, &c. R. R. Co. 15 B. Mon. (Ky.) 218; O'Neal v. King, 3 Jones (N. C.), L. 517; Miller v. Pittsburgh, &c. R. R. Co., 40 Penn. St. 237; Branham v. Record, 42 Ind. 181;

Woonsocket, &c. R. R. Co. v. Sherman, 8 R. I. 564; North Mo. R. R. Co. v. Winkler, 29 Mo. 218; Warner v. Callendar, 15 Ohio St. 190.

<sup>4</sup> Chamberlain v. Painesville & Hudson R. R. Co., 15 Ohio St. 225; Ashtabula, &c. R. R. Co. v. Smith, 15 Ohio St. 328. A condition as to the location of a depot does not invalidate a subscription. Racine County Bank v. Ayres, 12 Wis. 512.

<sup>5</sup> Smith v. Allison, 23 Ind. 366.

compliance with the condition to make the subscriber liable for calls on his subscription.<sup>1</sup>

Where a subscription is made upon condition that the railway shall "pass" through a certain county, the construction of the road through such county is not a condition precedent to the collection of the subscription; it is sufficient if the road is thus permanently located.<sup>2</sup>

In a Pennsylvania case,<sup>3</sup> the plaintiff subscribed for twenty shares in the P. and C. R. R. Co. on the express condition that the company should "*locate and construct* its road" along a certain route. He paid one instalment and a part of a second, but delayed the payment of the balance, until the company suspended operations. The road had been located as required, but had not yet been constructed. It was held that the construction was not a condition precedent; that, the company having located its road as agreed upon, the defendant could not complain that it had not been constructed, when he himself had refused performance of his contract. The undertaking was that the subscription should be paid in accordance with the calls, and upon the part of the company that the location should be made as stipulated, and that the construction should proceed as fast as possible. The suspension of work, long after defendant's stock became due, was held to be no defence to the action.

In a Kentucky case,<sup>4</sup> the appellant with others, agreed to pay to the Maysville and Lexington R. R. Co., on each share of stock subscribed by them, upon condition that said railway should be so located and constructed as to make the town of Carlisle a point, "at such times and places as may be required by the board of directors." It was held that the subscribers were bound to pay their subscriptions upon the location of it so as to make Carlisle a point, and that its construction by the company was not a condition precedent; and that the failure of the company to complete the Maysville and Lexington railroad did not have the effect to release the subscribers for stock from the payment of their subscriptions as they may be necessary to pay debts incurred.

<sup>1</sup> Warner v. Callender, 20 Ohio St. 190; Swartwout v. Michigan Air Line R. R. Co., 24 Mich. 389.

Chamberlain v. Painesville & Hudson R. R. Co., ib. 225.

<sup>2</sup> North Missouri R. R. Co. v. Winkler, 29 Mo. 318; Ashtabula & New Lisbon R. R. Co. v. Smith, 15 Ohio St. 328;

<sup>3</sup> Miller v. Pittsburgh, &c. R. R. Co., 40 Penn. St. 237.

<sup>4</sup> McMillan v. Maysville & Lexington R. R. Co., 15 B. Mon. (Ky.) 218.

In a Rhode Island case,<sup>1</sup> a subscription was made with the condition that it should be payable "if the road was built through the village of P." It was held that the condition was complied with when the road was in good faith located and designed to be built through that village, and a portion of the route built, although none of the road was completed.

It is not a good defence to an action brought upon a stock subscription, to aver that at the time the subscription was made, the soliciting agent of the company agreed in writing, separate from the contract of subscription, that if the citizens of a named place and vicinity would subscribe a given sum to such stock, the proposed road should be located within a given distance of such place; and that such subscription should be expended on a certain part of said road; and that the subscription was made in consideration of such agreement; and that said agreement was not performed by the company.<sup>2</sup>

In a Missouri case<sup>3</sup> certain persons entered into a contract in the following form: "We, the subscribers, bind and obligate ourselves to subscribe to the capital stock of the North Missouri R. R. Co. the sums set opposite our names, one-half the amount to be paid in six months, and one-half in twelve months from this date, on condition that a depot is located on the land of D., which adjoins High Hill. This subscription is made to comply with the terms on which the directors of said company have made the location of a depot on said D.'s land." It was held that this was a subscription *in presenti*, and not a mere agreement to subscribe in the future; and that the subscription became absolute upon the location of the depot at the designated place. And generally, where it can be done without doing violence to the language used, these conditions will be construed favorably to the furtherance of the enterprise. Indeed, the same rules prevail as to the construction of this class of contracts, as to others, and the true intent and meaning of the parties will be regarded; and in order to ascertain the meaning of the parties, the circumstances attending the agreement may be shown.<sup>4</sup>

<sup>1</sup> Woonsocket Union R. R. Co. v. Sherman, 8 R. I. 564.

<sup>2</sup> Brownlee v. Ohio, Indiana & Illinois R. R. Co., 18 Ind. 68, where the condition in the subscription was that the road should be located within twenty rods of St. Omer. It was held that the meaning was, that the road should be constructed

to run within twenty rods of St. Omer. Jewett v. Lawrenceburgh, &c. R. R. Co., 10 Ind. 539.

<sup>3</sup> North Missouri R. R. Co. v. Miller, 31 Mo. 19.

<sup>4</sup> Detroit, &c. R. R. Co. v. Starnes, 38 Mich. 698.

Where a subscription was made for a given number of shares of stock in a railroad company, payable at such times and in such instalments as the directors might prescribe, provided the road should be "permanently located" on a given route, and that a "freight-house and depot be built" at a point named, it was held that the provision in relation to the erection of the buildings was a stipulation merely, and its performance not a condition precedent to the right to collect the amount of the subscription.<sup>1</sup>

A person subscribed for shares in the stock of a railroad company, on the express condition that the company should locate and construct their railroad along a specified route, and having paid one instalment and part of the second, delayed the payment of the balance, as the calls were made, until the company, before the road was constructed along the route mentioned, suspended operations; after which payment was refused on the ground that though the road had been *located* by the company, they had not *constructed* it, according to the condition in the subscription. In an action for the subscriptions, it was held, that the promise of subscription being precedent to that of construction upon the part of the company, the defendant could not insist upon performance by the railroad company while he refused performance on his part; and that the road having been located as stipulated, and completed so far as the means of the company would allow, it was a compliance with the condition, and that the plaintiffs were entitled to recover. The condition in the contract of subscription was not a condition precedent, and did not require the completion of the road before payment could be required, but only that, when located and constructed it should occupy the route designated; the undertaking being, on the part of the subscriber, to pay as calls should be made by the directors, and on the part of the company to locate as stipulated, and to construct as fast as their means would allow.<sup>2</sup>

If the condition relates to the construction of the road, the fact that it was constructed by another company will not defeat the subscription;<sup>3</sup> as, the object being to secure the construction of the road, unless expressly so stated it is of no importance to the sub-

<sup>1</sup> Chamberlain v. Painesville & Hudson R. R. Co., 15 Ohio St. 225; Ashtabula & New Lisbon R. R. Co. v. Smith, 15 Ohio St. 328.

<sup>2</sup> Miller v. Pittsburgh & Connellsville R. R. Co., 40 Penn. St. 237.

<sup>3</sup> Michigan, &c. R. R. Co. v. Bacon, 33 Mich. 466; Detroit, &c. R. R. Co. v. Starnes, *ante*.

scribers who builds it, if it is built in pursuance of the plan existing when the subscription was entered into.

**SEC. 34. Waiver of Conditions.**—The subscriber may waive performance of the conditions under which his subscription was made,<sup>1</sup> and this may be done by any act as a member of the corporation under his subscription; because until his subscription becomes operative by a performance of the condition, he does not become a member;<sup>2</sup> therefore, when he *acts* as a member, it is full evidence that he has waived the condition and elected to treat the subscription as absolute. Thus, acting as judge of an election held by the corporation, has been held to amount to a waiver of any condition to a subscription to its stock, and to render it absolute;<sup>3</sup> and such also is the effect of any acts of co-operation by the subscribers with the corporation, which are peculiar to members thereof.<sup>4</sup> So too, if the subscriber pays his subscription<sup>5</sup> before the condition is performed, or gives his unconditional notes for the same, he *prima facie* waives the condition.<sup>6</sup> But, where instalments are paid by a sub-

<sup>1</sup> *Lane v. Brainerd*, 30 Conn. 567; *Hanover Junction, &c. R. R. Co. v. Haldeman*, 82 Penn. St. 36; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Montpelier, &c. R. R. Co. v. Langdon*, 45 Vt. 137; *Wilmington, &c. R. R. Co. v. Robeson*, 5 Ired. (N. C.) 391; *Reformed Dutch Church v. Brown*, 17 How. Pr. (N. Y.) 287; *Parker v. Thomas*, 19 Ind. 213; *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 240.

<sup>2</sup> *North Mo. R. R. Co. v. Winkler*, 29 Mo. 318; *Chamberlain v. Painesville, &c. R. R. Co.*, 15 Ohio St. 225.

<sup>3</sup> *Pittsburgh, &c. R. R. Co. v. Proudfit*, 2 Pittsb. (Penn.) 85. Voting on his stock, *Dayton, &c. R. R. Co. v. Hatch*, 1 Dis. (Ohio) 84.

<sup>4</sup> *Hutchins v. Smith*, 46 Barb. (N. Y.) 235; *Bedford R. R. Co. v. Bowser*, 48 Penn. St. 291; *Cabot, &c. Bridge Co. v. Chapin*, 6 Cush. (Mass.) 50; *Dayton, &c. R. R. Co. v. Hatch*, 1 Dis. (Ohio) 84; *N. H. Central R. R. Co. v. Johnson*, 30 N. H. 407; *Clarke v. Thomas*, 34 Ohio St. 46; *Atlantic Cotton Mill v. Abbott*, 9 Cush. (Mass.) 423; *Reformed Protestant Dutch Church v. Brown, ante*.

<sup>5</sup> An express condition upon which a note was made payable, "that a depot be established within eighty rods of the

present town of Wheatland," was not fulfilled by the building of a depot within eighty rods of the limits of the town as extended after the note was given. The recorded plat of the town at the date of the execution of the note will govern in the construction of the contract. Where a note for railway shares was given upon the condition that "a depot be established within eighty rods of the present town of Wheatland," and, before the depot was established, the maker made certain voluntary payments, and it was held that he could not recover the sums paid if no promise, fraud, or mistake were shown. *Davenport & St. Paul R. R. Co. v. Rogers*, 39 Iowa, 298.

<sup>6</sup> *Slipher v. Earhart*, 83 Ill. 173; *O'Donald v. Evansville, &c. R. R. Co.*, 14 Ind. 267; *Evansville, &c. R. R. Co. v. Wampler*, 19 id. 347; *Henderson, &c. R. R. Co. v. Moss*, 2 Duv. (Ky.) 242; *Parker v. Thomas*, 19 Ind. 213; *Evansville, &c. R. R. Co. v. Dunn*, 17 id. 603; *Baker v. Evansville, &c. R. R. Co.*, 14 id. 363; *McDaniel v. Evansville, &c. R. R. Co.*, 14 id. 464; *Williams v. Evansville, &c. R. R. Co.*, 14 id. 428. The giving of a note some time after the subscription is entered into, cannot be treated as a part of the contract of subscription.

scriber without knowledge of the fact that the conditions have not been performed, or under a false or fraudulent assurance by officers of the company that they have been performed, when in fact they have not been,<sup>1</sup> or when such notes are given as a part of the original contract, and in pursuance of it, no waiver can be predicated thereon.

### SEC. 35. Defences to Actions for Subscriptions: Change in Charter.

— A subscription to the stock of a corporation is a contract between the subscriber and the corporation, and is open to the same defences as would be admissible in the case of ordinary contracts. There are many implied conditions incident to such contracts, beyond the provisions which appear upon their face. Thus, where a charter has been obtained for a railroad, or articles of association have been filed, the subscription for stock therein is a contract to pay for stock in a corporation for the construction of a railroad substantially as provided in the charter, and subject to the powers therein, and by the general law conferred upon the company. Consequently, if after the subscription has been made, the company procures a new charter materially and fundamentally changing the original plan, or procures amendments thereto which have that effect, the subscriber is, in equity at least, not bound to pay his subscription for the furtherance of the new enterprise, because he has not contracted to take stock in the enterprise contemplated in such new or amended charter.<sup>2</sup> No more definite rule as to what changes in the plans or charter of the company will absolve a subscriber from liability thereon can be given than that any such changes in the charter, and character of the enterprise, *as materially infringe the essential terms of the contract entered into, or as engraft upon it more onerous terms or conditions*, which were not contemplated under the charter as existing when the subscription was made, will have that effect. Thus, in a Vermont case,<sup>3</sup> it was held that a corporation created for

But if given at the time, or in pursuance of an express provision therein that a note should be given, it would probably not be treated as a waiver. *Id.*

<sup>1</sup> *Ridgefield, &c. R. R. Co. v. Brush*, 43 Conn. 86; *Morris, &c. Co. v. Nathan*, 2 Hall (N. Y.), 239; *Oldtown, &c. R. R. Co. v. Veazie*, 39 Me. 571; *Somerset, &c. R. R. Co. v. Cushing*, 45 id. 524; *Livesey v. Omaha Hotel Co.*, *ante*.

<sup>2</sup> *Kenosha, &c. R. R. Co. v. Marsh*, 17 Wis. 13; *Sparrow v. Evansville, &c.*

*R. R. Co.*, 7 Ind. 369; *Marietta, &c. R. R. Co. v. Elliott*, 10 Ohio St. 57; *Memheim, &c. Plank Road Co. v. Arndt*, 31 Penn. St. 317; *Witter v. Mississippi, &c. R. R. Co.*, 20 Ark. 463; *Stevens v. Rutland, &c. R. R. Co.*, 29 Vt. 545; *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573; *Winters v. Muscogee R. R. Co.*, 11 Ga. 438; *Everhart v. West Chester R. R. Co.*, 28 Penn. St. 339; *Champion v. Memphis, &c. R. R. Co.*, 35 Miss. 692.

<sup>3</sup> *Stevens v. Rutland & Burlington*



the purpose of constructing a railroad between certain termini will be enjoined, at the instance of a stockholder who has not assented thereto, from using the funds of the corporation, or pledging its credit, for the purpose of extending the road beyond such termini; and that the rule is not changed by the fact that the extension was authorized by the legislature and approved by a majority of the stockholders. The doctrine expressed in this case is in accordance with,<sup>1</sup> and mainly predicated upon, an early New York case<sup>2</sup> which has been criticised<sup>3</sup> and doubted<sup>4</sup> in later New York cases; but the rule stated therein, in so far as it relates to the effect of a fundamental alteration in the contract relations of the parties, seems to be well sustained, both upon principle and authority;<sup>5</sup> because *neither the legislature nor a majority of the stockholders can, without his assent or concurrence, bind a subscriber to a contract other than that which he entered into at the time of subscribing for the stock.*<sup>6</sup>

R. R. Co., 29 Vt. 545. But see Rutland, &c. R. R. Co. v. Thrall, 35 Vt. 536, where it was held that, if the proposed change of route was abandoned, the original subscriptions may be enforced.

<sup>1</sup> Hartford, &c. R. R. Co. v. Croswell, 5 Hill (N. Y.), 383.

<sup>2</sup> McCullough v. Moss, 1 Den. (N. Y.) 580.

<sup>3</sup> Schenectady, &c. R. R. Co. v. Thatcher, 11 N. Y. 102.

<sup>4</sup> Buffalo, &c. R. R. Co. v. Dudley, 14 N. Y. 336.

<sup>5</sup> Marietta, &c. R. R. Co. v. Elliott, 10 Ohio St. 57; Kenosha, &c. R. R. Co. v. Marsh, 17 Wis. 13; Sparrow v. Evansville, &c. R. R. Co., 7 Ind. 369; Union Locks, &c. v. Towne, 1 N. H. 44; Witter v. Mississippi, &c. R. R. Co., 28 Ark. 462; Winter v. Muscogee R. R. Co. 11 Ga. 438; Supervisors v. Memphis, &c. R. R. Co., 32 Miss. 378. But it is questionable whether the change in the charter in Hartford R. R. Co. v. Croswell, *ante*, would now be regarded as a fundamental alteration of the contract. See *post*.

<sup>6</sup> Everhart v. Philadelphia, &c. R. R. Co., 28 Penn. St. 339; Southern Penn. Iron & R. R. Co. v. Stevens, 87 Penn. St. 190; Fry v. Lexington, &c. R. R. Co., 2 Met. (Ky.) 314; Troy, &c. R. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Kean v. Johnson, 9 N. J. Eq. 401; Illinois Grand Trunk R. R. Co. v. Cook, 29 Ill. 237.

The rule may be said to be that, if the name and fundamental purposes of a corporation are changed under such circumstances that it can be said to operate as a fraud upon the subscribers to the original stock, they are thereby released from their subscriptions. Thus, by the supplement to an act incorporating an iron and railroad company, the name of the company was changed, and authority was given to purchase and cancel the original stock; and the main purpose of the new company was to be that of a general transportation company. It was held to be a fair question for the jury, whether a combination to change the fundamental purpose of the original act by the supplement, and divert the stock of an original subscriber to this new end, was not a fraud upon him; and if they so found, that an action upon the original subscription could not be sustained. Southern Penn. Iron Co. v. Stevens, 87 Penn. St. 190; Burrows v. Smith, 10 N. Y. 550; McCray v. Junction R. Co., 9 Ind. 359; Booe v. Same, 10 id. 93; Union Locks & Canals v. Towne, 1 N. H. 44; Thompson v. Guion, 5 Jones (N. C.), 113; Marietta, &c. R. R. Co. v. Elliott, 10 Ohio St. 57; Woodhouse v. Commonwealth Ins. Co., 54 Penn. St. 307. But a change in the act of incorporation enlarging the powers of the company, but not authorizing a material departure from the original design for which it was insti-

Thus, in the New York case before cited,<sup>1</sup> the defendant subscribed to ten shares of stock under a charter for the purpose of establishing a railroad from Hartford to New Haven. Subsequently, the corporation procured an amendment to its charter, authorizing it to procure steamboats not exceeding \$200,000 in value, to use in connection with their railway, and to issue additional stock; and the act was accepted by the directors and a *majority* of the stockholders, but the defendant never assented thereto; and in an action to recover the amount of his subscription, it was held that he was released from liability upon his subscription, because of the alteration in the plaintiff's charter, which worked a radical change in the contract into which the defendant entered.

In an early Massachusetts case,<sup>2</sup> this principle was acted upon. In that case, an action was brought upon a subscription contract for stock, by which the defendant agreed to take one share, and pay all assessments upon it. The ground of defence was, that the location of the turnpike had been changed by an act of the legislature passed after the defendant's subscription, at the instance of the corporation and without the assent of the defendant. It was held that the defendant was, by the acts stated, released from his subscription, the court saying: "The plaintiffs rely on an express contract, and were bound to prove it as they allege it. Here, the proof is of an engagement to pay an assessment for making a turnpike in a certain specified direction. The defendant may truly say, '*Non haec in foedera veni.*' He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporators thereto."<sup>3</sup> But the doctrine of the Ver-

tuted, would not release those who have subscribed for the stock. *Pacific R. v. Hughes*, 22 Mo. 291. A change in the name of a corporation does not affect the validity of a stock subscription. *Bucksport, &c. R. R. Co. v. Buck*, 68 Me. 80. A subscriber to the capital stock of a corporation agrees to be subject to the reasonable rules and regulations which may from time to time be adopted, and he cannot avoid payment of his subscription because the charter has been amended on the application of the directors, and the amendment accepted by them, reducing the number of days' notice of the call for subscriptions. *Illinois River, &c. R. Co. v. Beers*, 27 Ill. 185.

<sup>1</sup> *Hartford, &c. R. R. Co. v. Croswell*, 1 Hill (N. Y.), 383.

<sup>2</sup> *Middlesex Turnpike Co. v. Locke*, 8 Mass. 268.

<sup>3</sup> *Indiana & Ebensburg Turnpike Co. v. Phillips*, 2 Penn. St. 184; *Bery v. Marietta, &c. R. R. Co.*, 26 Ohio St. 673; *Nugent v. Supervisors*, 19 Wall. (U. S.) 241; *Davies v. Sweeney*, 60 N. Y. 463; *South Georgia, &c. R. R. Co. v. Ayres*, 56 Ga. 230; *Sparrow v. Evansville, &c. R. R. Co.*, 7 Ind. 369; *Rutland, &c. R. R. Co. v. Thrall*, 35 Vt. 536; *Marietta, &c. R. R. Co. v. Elliott*, 10 Ohio St. 57; *Manheim, &c. Plank Road Co. v. Arndt*, 31 Penn. St. 317; *Hester v. Memphis, &c. R. R. Co.*, 32 Miss. 378; *Rines v. Plank*

mont case<sup>1</sup> is not followed in several of the States, and where an amendment to the charter simply confers upon the corporation the right to extend its line beyond the terminus named in the charter,<sup>2</sup> and it is not intended to use the funds resulting from the original subscription to construct it; although, in some of the States, an increase in the capital stock without the assent of the subscribers is held such a change of the contract as releases them from liability for the subscription;<sup>3</sup> and the same rule was also applied where the charter was so amended as to stop short of its original terminus, and pass by a different route.<sup>4</sup>

But where an extension of the line is granted by the legislature, either by an additional charter or by an amendment of the old one which does not contemplate the use of the funds obtained under the subscription for its construction, a subscriber will not be released from his obligation; nor will the mere acceptance by the company of an amendment to its charter authorizing it to build a branch road, *without any steps being taken by the company to appropriate its funds to the building of the branch*, be a ground for releasing a stockholder who had not consented to the amendment.<sup>5</sup>

**SEC. 36. When Consent of all to the Change is Necessary.** — Under the provisions of the national Constitution, prohibiting the States from making any law impairing the obligation of contracts, no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a private pecuniary corporation without the consent of all the stockholders, unless the legislature<sup>6</sup> has

Road Co., 30 Ala. 92; Barret v. Alton, &c. R. R. Co., 13 Ill. 504; New Orleans, &c. R. R. Co. v. Harris, 27 Miss. 517; Pacific R. R. Co. v. Renshaw, 18 Mo. 210; Fry v. Lexington, &c. R. R. Co., 2 Met. (Ky.) 314; Carlisle v. Terre Haute, &c. R. R. Co., 6 Ind. 316; Marsh v. Fulton County, 10 Wall. (U. S.) 676; Buffalo, &c. R. R. Co. v. Dudley, 14 N. Y. 336.

<sup>1</sup> Stevens v. Rutland, &c. R. R. Co., 29 Vt. 545.

<sup>2</sup> Cross v. Peach Bottom R. R. Co., 90 Penn. St. 392.

<sup>3</sup> Hughes v. Antietam Mfg. Co., 34 Md. 316; Bery v. Marietta, &c. R. R. Co., 26 Ohio St. 673.

<sup>4</sup> Winter v. Muscogee R. R. Co., 11 Ga. 438. But see Delaware & Atlantic R. R. Co. v. Trick, 23 N. J. L. 321, where it was held to be no defence to a call that the

name of the company, or the length and termini of the road had been materially changed.

<sup>5</sup> Hawkins v. Mississippi & Tennessee R. R. Co., 35 Miss. 688.

<sup>6</sup> Mowrey v. Indianapolis, &c. R. R. Co., 4 Biss. 78. See also City of Covington v. Covington, &c. Bridge Co., 10 Bush (Ky.), 69; Allen v. Buchanan, 9 Phil. (Pa.) 283. Any fundamental change in the character of a corporation relieves a non-assenting subscriber from liability. Plank Road Co. v. Arndt, 31 Penn. St. 317; Nugent v. Supervisors, 19 Wall. (U. S.) 241; Supervisors of Fulton Co. v. Miss. & Wab. R. R. Co., 21 Ill. 338; Hartford & N. H. R. R. Co. v. Croswell, 5 Hill (N. Y.), 383; Railroad Co. v. Leach, 4 Jones (N. C.), Eq. 340; First National Bank of Charlotte v. City of Charlotte,

provided otherwise in the charter. But such alterations of the charter of a private corporation, when merely auxiliary, may be adopted by a majority of the corporators, and such acceptance will bind the whole; but, if such alterations are fundamental, the acceptance must be unanimous.<sup>1</sup>

The acceptance of a charter amendment, like the acceptance of an original charter, may be proved by showing that the corporation has done corporate acts authorized by the amendment, but which without it would have been unauthorized. And, where a corporation by its conduct accepts the benefits of an act amending its charter, it must take the act as a whole, with its burdens also.<sup>2</sup> Where the charter of a company requires its stock to consist of not less than a given number of shares, no action can be maintained for subscriptions to stock until the required number of shares are taken. A subsequent alteration of the charter reducing the amount of the capital will not affect prior subscribers.<sup>3</sup> And the corporation, having fixed the amount of the capital stock under such a charter, cannot change it, either by its own act or through the intervention of the legislature, without the assent express or implied of *all* the subscribers.

A subscriber to shares in a corporation contracts with reference to the charter; and the number of shares to be subscribed, or the whole capital stock necessary to do the contemplated business, constitutes an important element in the contract. For the corporation to release subscriptions so as to reduce the capital largely and materially, may operate as a release of other subscribers. A mere

(N. C.). In *American Printing House v. Trustees*, 104 U. S. 711, the plaintiff corporation was organized in Kentucky for the purpose of printing books for the blind, and provided in its charter that the presidents of the State boards of trustees contributing to the general scheme should constitute a board of visitors with the right to visit the printing-house, examine its books, investigate the proceedings of its trustees, and to appoint new ones in case of mismanagement. With this provision in view a board of trustees was organized in Louisiana and received contributions for the Kentucky corporation. Subsequently the charter of the latter corporation was altered by the legislature so that the right of visitation was no longer

left to the presidents of the State boards of trustees. The contributors thereupon demanded a return of their money, and the Kentucky corporation brought suit against the Louisiana board to recover the same. It was held that the change in the charter was such as to excuse the defendant from making payment to the plaintiff, especially since the original contributors insisted on a return of their money.

<sup>1</sup> *State v. Accommodation Bank of La.*, 26 La. Ann. 288.

<sup>2</sup> *Kenton County Court v. Bank Lick Turnpike Co.*, 10 Bush (Ky.), 529.

<sup>3</sup> *Oldtown & Lincoln R. R. Co. v. Veazie*, 39 Me. 571; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172.

nominal subscription, to fulfil the letter and break the spirit of the contract, is no substantial compliance with the charter, and when released because it was nominal, it becomes equivalent to no subscription *ab initio*. But if a subscriber to stock of a railroad company acquiesces in the progress of the work, by payment of his subscription, assessed or otherwise, he cannot afterwards object, either to the failure originally to get subscribers to the whole stock, or to a material amendment of the charter; but the fact that he merely pays his assessments to have the route surveyed is not sufficient to show such acquiescence. And, where the question of acquiescence has been fairly submitted to the jury, and has been passed upon by them, with evidence enough to sustain the verdict, the appellate court will not interfere.<sup>1</sup>

**SEC. 37. Subscriber's assent, effect of.** — If a subscriber assents to a change in the character of the enterprise or concurs therein, *either expressly or by his long continued silence and apparent acquiescence*, he is estopped from disputing his acquiescence in the alteration of the original scheme. If a subscriber knows of the alteration in the charter, and does not desire to be bound thereby, it has been suggested that it is his duty, at least seasonably to object thereto, or perhaps to proceed against the corporation for an injunction or mandamus to prevent the change; and that failing to do so, he is estopped from setting up such change in defence.<sup>2</sup> In the case

<sup>1</sup> *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 240. Where the defendant subscribed for two shares in the capital stock of a corporation on certain conditions named therein, none of which had reference to the number of shares subscribed for, and paid three assessments thereon, and the shares were afterwards, to pay further assessments, sold for a sum less than the assessments, it was held that the defendant was liable for the balance, though the minimum number of shares required by law had not been subscribed. *York & Cumberland R. R. Co. v. Pratt*, 40 Me. 447. In a Pennsylvania case, where, after subscribing for stock under an act of assembly which required subscriptions to a certain amount before corporate authority should be granted, a subsequent act was passed reducing the amount of subscriptions required, under which the company was organized, it was held that the change would not release

from liability a person subscribing, who had also voted at the organization and for election of directors, in right of his subscription; and in an action by the company against such stockholder for the sum subscribed, that it was error to instruct the jury that the defendant was relieved by the change if he did not know of it, and referring the question of his knowledge to them. *Bedford R. R. Co. v. Bowser*, 48 Penn. St. 28.

<sup>2</sup> *No. Carolina R. R. Co. v. Leach*, 4 Jones (N. C.), L. 340. In this case *BATTLE, J.*, very carefully examined the grounds of the doctrine stated in the text, and as his opinion is regarded as of high authority upon this question, and is often cited, we give it here. He said: "It is admitted that the eastern terminus of the plaintiff's road was materially changed from the point designated in the charter, and the defendant contends that he was thereby released from his obligation to pay

cited in the last note the defendant sought to avoid the payment of his subscription to the stock of the defendant's road, upon the

for the stock for which he had subscribed. The argument is that the contract created by his subscription was, that he should pay for the stock taken by him, upon condition that the road should be built according to the termini and route prescribed in the charter; and consequently that any material change of either the termini or route would be a failure on the part of the plaintiff in the performance of a condition precedent, whereby he would be discharged from his part of the agreement; or, in another view, it would be an attempt on the part of the plaintiffs to hold him bound by a contract into which he never entered. The question which the assumed defence raises is an important one, and we will now proceed to consider its validity. It may be conceded, at least for the sake of the argument, that if the legislature of a State grant a charter for building a railroad, turnpike, or canal between certain *termini*, and along a certain route, upon the faith of which subscribers take stock, and afterwards, without the consent and against the will of one or more of the subscribers, the legislature passes another act changing such *termini* or route, both or either of the dissenting stockholders may refuse to pay for the stock for which they had subscribed. Such was the decision of the Supreme Court of Georgia in the case of *Winter v. the Muscogee R. R. Co.*, 11 Ga. 438, founded upon previous similar adjudications made in Massachusetts and New York. See *Middlesex Turnpike Co. v. Locke*, 8 Mass. 268; *Same v. Swan*, 10 Mass. 385; *The Hartford & New Haven R. R. Co. v. Croswell*, 5 Hill (N. Y.), 386. The principle of the decision is, that the stockholder, when called on to pay his subscription for the building of such a road, without his consent, may truly say, '*non hæc in fœdera veni.*' Assuming, then, this to be true, an interesting question may arise, whether the principle will apply to a case where the alteration of the line of the road is made by the company without the consent, and against the will, of the stockholder, and also without the sanction of any legislative amendment of

the charter. In the latter case there is certainly not the same necessity for protecting the dissenting stockholder, by holding him released from the obligation of paying his subscription. It is clearly settled that he may avail himself of the writs of prohibition or mandamus, as his case may require, either to prevent the corporation from doing him an injury, or to compel it to yield him a right. Thus in *Blakemore v. Glamorganshire Canal Navigation Co.*, 6 Eng. Con. Ch. 544, LORD ELDON said, when the case was before him in one of its earliest stages, 'I have therefore stated, and I have more than once acted on the doctrine, that if a deviation from the line marked out by Parliament were attempted, I would (unless the House of Lords were to correct me) stop the further making of a canal which was in progress; and for this reason, that a man may have a great objection to a canal being made in one line which he would not have to its being made in another; and particularly he might feel that objection in a case where parties, after obtaining leave to do one thing, set about doing another. It may, I admit, be of no greater mischief to A. B. that the canal should come through the lands of C. D. than through those of E. F.; but to that, my answer is, that you have bargained with the legislature that you shall do the act they have authorized you to do, and no other act.' We have adopted, and acted upon, at the present term, the principle thus laid down by one of England's greatest chancellors, by enjoining the Greenville and Raleigh Plank Road Company from establishing and running a line of stages against the wishes of some of the corporators, upon the ground that such an application of their funds was not authorized by their charter. *Wiswall v. Greenville & Raleigh Plank Road Co.*, 8 Jones (N. C.) Eq. 188; *Mayor and Aldermen of Norwich v. the Norfolk Railway Co.*, 30 Eng. Law & Eq. 120, also sanctions the doctrine that railway companies may be restrained by injunction from misapplying the funds of the company. The above are all cases of injunction, where

ground that one of the termini was materially different from that provided in the charter. He failed to show, however, that he had ever taken any steps to prevent the change, or had ever even objected to the change while the work was going on; and the court held that he was estopped by his apparent acquiescence from setting up such change of termini as a ground of defence.<sup>1</sup>

No definite rule, which will be applicable in all cases, can be given, by which to determine whether a change in the plan of oper-

railway and other like companies have been prevented, at the instance of persons interested, from doing wrong. The case of *Regina v. The York & North Midland Railway Co.*, 16 Eng. Law & Eq. 299, shows, that in a proper case, a party interested may compel, by mandamus, a railway company to complete a railway which it has begun. It is true that the case, though decided upon great consideration by the Court of Queen's Bench, with Lord Campbell at its head, was reversed in the Court of Exchequer Chamber, but solely upon the ground that the words of the act of Parliament, upon which the question depended, were not, and could not be, construed to be compulsory upon the company. See the case in 18 Eng. Law & Eq. 199; see also *Regina v. Great Western Railway Co.*, id. 364. If the principle thus seemingly established by the greatest force of authority be correct, we cannot perceive why it did not furnish the defendant with ample means for preventing the wrong and injury of which he complains. Why should the courts interpose or protect him (to the great detriment of the company, in depriving it of its fund), by holding him discharged from his subscription, when he neglected to avail himself of a remedy, plain and ample? We need not, however, answer this question. There is another objection to the defence, about which we do not entertain a doubt. To make his defence available, it is certainly incumbent on the defendant to show that the alteration in the eastern terminus of the road was made without his concurrence and consent. Such seems to have been the opinion of the Court of Appeals of South Carolina, in the case of the *Greenville & Columbia R. R. Co. v. Coleman*, 5 Rich. (S. C.) 118, where they say, at page

135, 'It would appear reasonable to say that, if the corporation did acts to which a member did not object, either because he was supine, or because he would not attend when he might and should have done so, it would not be harsh to hold him estopped from disputing his acquiescence, especially when liabilities, duties, and burdens might accrue thereby upon the corporation.' There is not a particle of proof, indeed, he has not alleged in his plea, that he ever made the slightest objection to the change; and the presumption is, in the absence of proof to the contrary, that he assented to it. He was, or might have been, present, either in person or by proxy, at the occasional meeting of the stockholders (see *London City v. Venacker*, 1 Ld. Raym. 500), and yet we never hear of his having raised his voice a single time against the alteration which he now alleges to be so great a grievance to him. We hold then, that the matter pleaded by the defendant in his second plea, and admitted upon the trial, furnishes no defence against the plaintiff's action." *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Hayworth v. Junction, &c. R. R. Co.*, 13 Ind. 348; *Booker's Case*, 18 Ark. 338; *Witter v. Mississippi, &c. R. R. Co.*, 20 Ark. 463; *Payson v. Stover*, 2 Dillon (U. S. C. C.), 427; *May v. Memphis, &c. R. R. Co.*, 48 Ga. 109; *Mowrey v. Indianapolis, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 78; *Bedford R. R. Co. v. Bowser*, 48 Penn. St. 29; *Martin v. Pensacola, &c. R. R. Co.*, 8 Fla. 370; *Memphis, &c. R. R. Co. v. Sullivan*, 57 Ga. 240.

<sup>1</sup> See opinion of BATTLE, J., in last note. See also *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 240, where the implied assent of the subscriber to the change is held sufficient to hold him to his subscription.

ations, or in the charter, will, in a given case, operate to discharge a subscriber from his liability upon a subscription; but it may be said that in all cases changes in the contract of subscription after it has been signed, material alterations in the charter not contemplated as it stood originally, or a departure from the substantial important features of the corporate organization as proposed to and accepted by the subscriber, or from its purposes and plans, — such as the majority of the directors would have, in virtue of the incorporation and aside from limits drawn from the subscription, the power to obtain or make, but *which materially change the subscriber's engagement from its terms and intention*, — will operate, if made without his assent, to discharge him from liability on his subscription.<sup>1</sup>

SEC. 38. **Changes which do not affect Subscriber's Liability.** — Changes which the directors or the majority of the stockholders have no power to make or carry into effect, because they are *ultra vires* or fraudulent, do not release a subscriber; his proper remedy is a resort to the courts to restrain or vacate the unlawful act or proceeding, and confine the corporation within limits corresponding with the subscription.<sup>2</sup> Nor do changes merely in matters of detail, not affecting the substantial nature and material features of the engagement as intended and entered into by the subscriber, release him.<sup>3</sup>

<sup>1</sup> *Nugent v. Supervisors*, 19 Wall. (U.S.) 241; *South Georgia, &c. R. R. Co. v. Ayres*, 56 Ga. 230; *Dorris v. Sweeny*, 60 N. Y. 463; *Bery v. Marietta, &c. Ry. Co.*, 26 Ohio St. 673; *Stockton, &c. R. R. Co. v. Stockton*, 57 Cal. 328; *Noesen v. Port Washington*, 37 Wis. 168; *Wilson v. Wills Valley R. R. Co.*, 33 Ga. 436; *Whitehall, &c. R. R. Co. v. Myers*, 16 Abb. Pr. (N. Y.) n. s. 34; *New Jersey, &c. R. R. Co. v. Strait*, 35 N. J. L. 323.

<sup>2</sup> *Hays v. Ottawa, &c. R. R. Co.*, 61 Ill. 422. *s. p.* *Ottawa, &c. R. R. Co. v. Black*, 79 Ill. 262.

<sup>3</sup> *Nugent v. Supervisors*, 19 Wall. (U.S.) 241. In *New Haven, &c. R. R. Co. v. Chapman*, 38 Conn. 56, the plaintiffs, a railroad company, were incorporated with a capital of five hundred thousand dollars, with power "to call the first meeting of the stockholders whenever one hundred thousand dollars or more of the capital stock shall have been subscribed for, to choose directors and perfect the organiza-

tion of said corporation," and "when so organized to proceed to commence the construction of the railroad." The sum of \$216,700 was subscribed, including the subscriptions of the defendants, and the first meeting of the stockholders was then held and directors chosen. Subsequently an amendment to the plaintiff's charter was passed by the General Assembly, authorizing the city of New Haven to subscribe \$200,000 to the capital stock, and to appoint two directors in the company, with one vote for every four shares of stock held by the city. Pursuant to the power so given, the city of New Haven subscribed \$200,000 to the stock, and appointed two directors who assumed and continued to discharge the duties of the office. No other subscriptions were made, and the directors thereupon proceeded to call in the capital stock, and to commence the construction of the railroad. In an action to recover subscriptions to the stock, it was held, (1.) that the term "organ-



**SEC. 39. Amendments made under Reservation in Charter, etc., Effect of.** — Another important exception to the rule as previously

ize," as used in the charter, embraced merely the choice by the stockholders of the necessary officers for the transaction of the business of the company, and that the plaintiffs, when so organized, \$100,000 having been subscribed to the stock, might legally begin the exercise of their corporate franchise; (2.) that the amendment to the charter, and the action of the plaintiff and the city under it, did not impair the rights of the defendants as stockholders, or relieve them from liability on their subscription. The principal claim in this case was that the change in the charter took away the defendant's right to vote for *two* of the directors of the corporation. Upon this point CARPENTER, J., said: "The defendants say that the destruction of this right absolved them from all obligation to pay for their stock. Whether it does or not is the question we are now to consider. Some amendments, or laws, affecting corporations are binding with or without their assent. Others bind the corporation and every member thereof, if assented to by a majority of the stockholders. And others are not binding upon non-consenting members, although assented to by the majority. All general laws, and mere matters of police regulation, are embraced in the first class. Additional powers, duties, and privileges, which do not change essentially the nature and character of the corporation, or the purpose for which it was created, and have for their object the promotion of the enterprise originally contemplated, fall within the second class. All amendments which work a radical change in the nature and character of a corporation, or the purpose for which it was created, are within the third class. It is not easy to establish a general rule by which it may be seen at a glance to which class any given case belongs. Each case must in a measure depend upon its own circumstances. A careful examination of the case before us, and the authorities bearing upon the question, has led us to the conclusion that it belongs to the second class, and that the amendment is binding upon every member of the corporation. There is no change in the character of the

corporation. It is a railroad company still, relating to an important public improvement. The object of its creation, the construction and operation of a railway from New Haven to Derby, remains precisely the same. There is some change in the mode of appointing the board of directors; but that change is not a radical one, nor is it, under the circumstances, an unreasonable one. So far from working an injury to the defendants, it is, as we have already seen, a benefit to them. The directors are elected by the stockholders, and every one has a voice in the election. No one has an undue advantage over the others, and the rights of all are carefully guarded. The object of the amendment was not to obstruct, hinder, or change, but to facilitate, the enterprise in which all were engaged; and, so far as we can see, it has had the designed effect. It is not an attempt on the part of the legislature to control the organization, or to place it in the power of one or more of the stockholders to elect all, or a majority, of the directors; but, on the contrary, the design was to prevent that result. The matter of voting and the mode of electing officers are usually provided for in the charter. The legislature may, in the first instance certainly, impose such terms and restrictions as may be thought best. The powers reserved will authorize subsequent legislation upon the same subject, so long as the owners of the stock retain the control of the corporation, and are all placed upon equal and fair terms. The rights, therefore, of which these defendants have been deprived are rights which they held subject to such reasonable changes and regulations as the legislature might make, with the assent of the corporation; and they are not thereby absolved from their obligation to pay for their stock." In *Troy & Rutland R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581, the company was incorporated with a capital of \$1,500,000. After the defendant subscribed to the stock, the articles of association were amended under a general law, by which the capital was reduced to \$325,000, and the contemplated road was materially shortened. The

stated is, that changes in the corporate affairs which may be considered authorized or contemplated by the charter and by-laws fairly construed, or which the corporation is invested with a discretion to make, do not discharge a subscriber; because his subscription must be presumed to have been made with a view to those laws, and to the fact that changes may possibly be made conformably to them.<sup>1</sup>

Thus, an alteration of a charter in pursuance of a power reserved, by changing its name, increasing its capital, and extending its road, does not discharge a subscriber to the capital stock from his liability.<sup>2</sup>

defendant refused payment of calls upon his stock, and, in an action brought to recover them, it was held that the plaintiffs were entitled to recover. There were other questions in the case. The presiding judge, who gave the opinion of the court, doubted upon this point, but seems to have acquiesced in the decision, partly upon the ground that there was evidence tending to show that the defendant assented to the change. But a majority of the court were of the opinion that there was no such radical change of the plan and business of the corporation as exonerated the defendant. The presiding judge in the course of his opinion says: "Admitting that an alteration may discharge the obligation, was not this one incidental to the undertaking, and to which the stockholder must be considered impliedly to assent? and if not, was it so material as to be a ground of defence?" In the case of *Buffalo & New York City R. R. Co. v. Dudley*, 14 N. Y. 336, it was expressly held that "an alteration by the legislature of the company's charter, in pursuance of powers reserved, by changing its name, increasing its capital, and extending its road, does not discharge the defendant from liability on his subscription; and this whether such alteration is beneficial to the defendant or not, the alteration having been duly made, and without any fraud on the part of the company." See also *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 11 N. Y. 102.

<sup>1</sup> *Mowrey v. Indianapolis, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 78; *Nugent v. Supervisors*, 19 Wall. (U. S. C. C.) 241; *Hays v. Ottawa, &c. R. R. Co.*, 61 Ill. 422; *Ottawa, &c. R. R. Co. v. Black*, 79

Ill. 262; *Terre Haute, &c. R. R. Co. v. Earp*, 21 Ill. 291; *Peoria, &c. R. R. Co. v. Elting*, 17 Ill. 429. Thus, where the act contains a provision that the legislature may alter, amend, or repeal the same, an alteration therein made at the request of the directors is binding upon the subscribers, and does not absolve them from their obligations. *Northern R. R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Pacific R. R. Co. v. Renshaw*, 18 Mo. 210; *Pacific R. R. Co. v. Hughes*, 22 id. 291; *Illinois River, &c. R. R. Co. v. Zimmer*, 20 Ill. 654. It is no defence to an action for calls, that the directors have altered the location of the company's road, if by the charter they had the discretion to do so. *Colvin v. Liberty & Abington Turnpike Co.*, 2 Ind. 511; *Railsback v. Liberty & Abington Turnpike Co.*, 2 Ind. 656; *Fry v. Lexington & Big Sandy R. R. Co.*, 2 Met. (Ky.) 814.

<sup>2</sup> *Schenectady, &c. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 id. 336; *Northern R. R. Co. v. Duane*, 2 Am. L. J. 481; *Durfee v. Old Colony &c. R. R. Co.*, 5 Allen (Mass.) 230; *Pacific R. R. Co. v. Hughes*, 22 Mo. 291; *Moore v. Hudson River R. R. Co.*, 12 Barb. (N. Y.) 156; *Whitehall, &c. R. R. Co.* 16 Abb. Pr. (N. Y.) N. s. 34; *Pacific, &c. R. R. Co. v. Renshaw*, 18 Mo. 210. If a railroad is located upon a different route from that provided in the articles of association, the original subscribers are released from their obligation. *Buffalo, Corning, & N. Y. R. R. Co. v. Pottle*, 23 Barb. (N. Y.) 21. *Macedon & Bristol Plank Road Co. v. Lapham*, 18 id. 312. But it is no defence to an action for calls, that the road has

When the charter of a railway company contains a clause authorizing the legislature to repeal or alter it, such alteration made on the application of the directors, without consulting the stock subscribers, does not absolve the latter from their subscriptions.<sup>1</sup> Nor where this power of alteration is reserved by the legislature, can a subscriber avoid payment because the charter of the road has been so changed as to authorize the company to purchase stock in other railway companies, even though the terminus of the road in which the stock was first subscribed is thereby changed;<sup>2</sup> nor although amendatory acts have been subsequently passed, affecting the original charter by extending its powers.<sup>3</sup> Under such circumstances a charter may be amended, and if the amendment is accepted by the directors, the stockholders under the original act, unless otherwise stated, will be held liable. The only question for consideration is, whether the value of the stock as an investment will probably be benefited thereby.<sup>4</sup>

When a person subscribes for stock under a charter giving to the legislature power to alter, amend, or repeal the charter, or gives to the corporation the right to reduce or to increase its capital stock, or to lease its roads, or to lease the roads of other companies, or to consolidate with other companies, or to adopt any route or termini the corporation may elect to take, — every person who subscribes for stock does so with the full understanding that his contract is liable to be changed in any or all those respects; and the charter and general law relating thereto being a part of the contract, unless he annexes an express specific condition to his subscription he cannot complain that the legislature exercises the right reserved, or that the corporation avails itself of the discretion or power which the law gives to it, nor claim that his contract is impugned by such acts, *unless the change is radical and fundamental*; and this doctrine is well sustained, both upon principle and authority.<sup>5</sup> Thus it is no

been shortened in pursuance of law. *Troy & Rutland R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581.

<sup>1</sup> *Northern R. R. Co. v. Miller*, 10 Barb. (N. Y.) 260.

<sup>2</sup> *Terre Haute & Alton R. R. Co. v. Earp*, 21 Ill. 291.

<sup>3</sup> *Peoria & Oquawka R. R. Co. v. Elting*, 17 Ill. 429.

<sup>4</sup> *Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654.

<sup>5</sup> *Bailey v. Hollister*, 26 N. Y. 112.

A subscription to the capital stock of a railroad company made before its incorporation, and agreeing to take certain shares therein, was held to be valid upon its subsequent acceptance by the company and payment of an assessment thereon, although the subscriber did not sign the articles of association, nor the subscription book kept by the company. And where articles of association contemplated a railroad from Buffalo to a point in Chautauqua County, on the State line; and the

defence to an action upon a subscription, that the route of the road has been changed, where the charter or general law gives the corporation the discretion to make such change,<sup>1</sup> — the rule being that a subscriber is not released from liability by any act of the corporation which works even a fundamental change, if it was authorized by laws existing when the subscription was made<sup>2</sup> or by the subscription itself;<sup>3</sup> because, in such cases the subscriber consents in

road was built from Buffalo to Jamestown in Chautauqua County, ten or more lines from the State line, and its further construction suspended; but this did not appear to be by any alteration of the articles of association, or by any resolution of the board of directors; and the road and franchises were afterwards sold upon foreclosure of a mortgage given by the company, — it was held that a subscriber was not released from his liability. *Buffalo & Jamestown R. R. Co. v. Clark*, 22 Hun (N. Y.), 359. And generally, an alteration in the organization or purposes of a railroad company, in order to operate to release a subscriber to its stock from his subscription, *must be fundamental, and one not provided for or contemplated by either the charter itself or the general laws of the State*. *Nugent v. Supervisors*, 19 Wall. (U. S.) 241.

<sup>1</sup> *Calvin v. Turnpike Co.*, 2 Ind. 656; *Northern R. R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Pacific R. R. Co. v. Renshaw*, 18 Mo. 210.

<sup>2</sup> *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 435; *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 336; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Burlington, &c. R. R. Co. v. White*, 5 Iowa, 409; *Nugent v. Supervisors*, 19 Wall. (U. S.) 241; *East Tennessee, &c. R. R. Co. v. Gannon*, 5 Sneed (Tenn.), 567; *East Lincoln v. Davenport*, 94 U. S. 801; *Calvin v. Liberty Turnpike Co.*, 2 Ind. 299; *Hays v. Ottawa, &c. R. R. Co.*, 61 Ill. 422; *Noyes v. Spaulding*, 24 Vt. 420; *Ottawa, &c. R. R. Co. v. Black*, 79 Ill. 262; *Cork & Y. R. R. Co. v. Patterson*, 18 C. B. 414; *Newhall v. Galena, &c. R. R. Co.*, 14 Ill. 273; *Railsback v. Liberty, &c. Co.*, 2 Ind. 656; *Mowrey v. Indianapolis, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 78; *Bish v. Johnson*, 21 Ind. 299; *Macedon, &c. Co. v. Lapham*, 18 Barb. (N. Y.) 312.

<sup>3</sup> In *Nixon v. Brownlow*, 3 H. & N. 686, the subscribers' agreement of a proposed company stated that it was formed for making a railway to be called "The Galway and Kilkenny Railway," and to commence at Kilkenny and terminate in the town of Galway, the capital to be one million in shares of £25 each. The deed empowered the directors to abandon the undertaking, or any part thereof, and also to make application to parliament for an act for any of the purposes aforesaid; also to fix upon, and from time to time to alter or vary the termini, route, course, or line of the railway, and to determine whether and how far, and to what extent, the undertaking should be carried into effect and deferred or abandoned; and in case any act should authorize the construction of a part thereof, to make in any subsequent session application for the construction of the remainder. The defendant executed the deed as a subscriber for one hundred and fifty shares, and paid the deposit of £1 10s per share. The directors applied to Parliament, and an act passed (9 & 10 Vict. c. cccxl.) which incorporated the company by the name of "The Kilkenny and Great Southern and Western Railway Company," for making a railway from Kilkenny to Cuddagh, the capital of the company to be £225,000 in 11,250 shares of £20 each. After the act passed the defendant was placed on the register of shareholders as a subscriber for fifty shares of £20 each. Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer, 2 H. & N. 455), that the defendant was a shareholder in the incorporated company, and liable as such to execution on a judgment recovered by a creditor against the company. WIGHTMAN, J., said: "We are of opinion that the company which has been established under the act is, in

advance to such amendments or changes as fairly come within the scope of this reservation of authority. In conformity with this principle, amendments increasing the liability of stockholders,<sup>1</sup> reducing or increasing the capital stock,<sup>2</sup> providing for leasing the road or its consolidation with other companies,<sup>3</sup> authorizing the cor-

effect, the same company that is contemplated by the subscribers' agreement, and that the directors have not exceeded the authority given to them by the subscribers' agreement, and that they were fully warranted in placing the name of the defendant upon the register of shareholders of the company formed under the act. The undertaking sanctioned by the act is one applied for by the directors, under the authority given to them by the subscribers' agreement; and according to the cases of the *Midland Great Western Railway Company of Ireland v. Gordon*, 16 M. & W. 804, and the *Cork & Youghal Railway Company v. Paterson*, 18 C. B. 414, the directors are warranted in putting upon the register of the shareholders of the company, constituted by the act of Parliament, the names of those who would have been upon the register if an act had passed in accordance with the original project, for the construction of a railway from Kilkenny to Galway. We are, therefore, of opinion, that upon the first point the judgment of the Court of Exchequer in the case of *Nixon v. Green*, 2 H. & N. 455, was correct, and our judgment is in favor of the plaintiff in the action." A stockholder who does not intend to be bound by a change in the charter must dissent within a reasonable time. *Martin v. Pensacola, &c. R. R. Co.*, 8 Fla. 370. But after shareholders in a joint-stock company have entered into a contract among themselves, under legislative sanction, and expended their money in the execution of the plan mutually agreed upon, the scheme cannot be radically changed by the majority, by virtue of legislative enactment, and a dissentient stockholder compelled to engage in a new and totally different undertaking, without impairing his contract with his associates and with the State. And a lease of the corporeal works and property with the franchises to another corporation, for 999 years, is such a novation of the undertak-

ing as will impair the obligation of the contract. The legislature, however, may, in the exercise of the right of eminent domain, authorize shares in corporations and corporate franchises to be taken for public uses, and, when public necessity requires it, grant authority to consolidate existing connected railroad routes, if they provide a just compensation for the shares of such stockholders as dissent; which latter is fully done by the New Jersey act of March 17, 1870, authorizing the consolidation of railroads, although it does not authorize a lease to be made to a corporation not of that State. *Black v. Delaware & Raritan Canal Co.*, 24 N. J. Eq. 455.

<sup>1</sup> *Meadow Dam Co. v. Gray*, 30 Me. 547; *Pacific R. R. Co. v. Renshaw*, 18 Mo. 210; *Northern R. R. Co. v. Miller*, 10 Barb. (N. Y.) 260. But see *Kenosha, &c. R. R. Co. v. Marsh*, 17 Wis. 13; *Oldtown R. R. Co. v. Veazie*, 39 Me. 571, to the contrary.

<sup>2</sup> *Schenectady &c. Co. v. Thatcher*, 11 N. Y. 102; *Pacific R. R. Co. v. Hughes*, 22 Mo. 291; *Moore v. Hudson River R. R. Co.*, 12 Barb. (N. Y.) 156; *Whitehall, &c. R. R. Co. v. Myers*, 16 Abb. Pr. (N. Y.) n. s. 34; *Troy, &c. R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 336; *Noyes v. Spaulding*, 27 Vt. 420; *East Lincoln v. Davenport*, 94 U. S. 801; *Nugent v. Supervisors*, 19 Wall. (U. S.) 241; *Ottawa, &c. R. R. Co. v. Black*, 79 Ill. 262; *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 435; *Burlington, &c. R. R. Co. v. White*, 5 Iowa, 409; *Bish v. Johnson*, 21 Ind. 299; *Calvin v. Liberty, &c. Turnpike Co.*, 2 id. 511; *East Tennessee, &c. R. R. Co. v. Gammon*, 5 Sneed (Tenn.), 507; *Hay v. Ottawa, &c. R. R. Co.*, 61 Ill. 422; *Newhall v. Galena, &c. R. R. Co.*, 14 id. 273; *Mowrey v. Indianapolis, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 78.

<sup>3</sup> In *Bishop v. Brainerd*, 28 Conn. 289, the New York and Boston Railroad Company, a corporation chartered by the legis-

poration to subscribe for stock of other roads,<sup>1</sup> authorizing a new organization under an amended or substituted charter,<sup>2</sup> providing

lature of Connecticut, became consolidated, under the same name, with a railroad corporation of the State of Rhode Island, the charter of the latter corporation specially authorizing such union, and that of the former authorizing the company "to connect and make joint-stock or common interest with any other railroad company." The charter of the Connecticut corporation was subject to amendment by the legislature, which afterwards passed a resolution ratifying and confirming the consolidation. By the articles of union the property of the original corporations was transferred to and vested in the new corporation, which was to pay the debts of the old corporations. B. was an original subscriber to the stock of the Connecticut corporation. A creditor of that corpora-

tion, whose claim accrued after the consolidation, factorized B. as the debtor of the Connecticut corporation. Upon a *scire facias* afterwards brought by him against B., it was held: 1. That while it was questionable whether the charter of the Connecticut corporation would have authorized such a consolidation, yet that the transaction was validated by the ratifying act of the legislature, which was to be considered as an amendment of the charter as much as if it had been expressly so declared. 2. That the consolidation being thus effected by direct legislation, under the reserved power of amending the charter, it was not necessary that the assent of all the stockholders should be obtained, nor that there should be any action of the stockholders or directors on the subject.

<sup>1</sup> *White v. Syracuse, &c. R. R. Co.*, 14 Barb. (N. Y.) 559. If the authority to make the change, as to lease or consolidate with one of two railroad companies, was given by the statute before the making of the subscription, its exercise does not release the subscriber. And it is of no importance that the consolidation took place without the actual knowledge of the subscriber. When he contracted, an authority to consolidate existed, and his contract, having been made under that law, must be presumed to have been made with reference to it, and cannot, therefore, be impaired by the law, because the law is a part of the contract. *Sparrow v. Evansville & Crawfordsville R. R. Co.*, 7 Ind. 369; *Bish v. Johnson*, 21 Ind. 299; *Illinois River R. R. Co. v. Beers*, 27 Ill. 185.

<sup>2</sup> In *Spriggs v. Western Union Tel. Co.*, 46 Md. 67, the court held that, on the acceptance of a charter by a corporation, the reservation by the legislature of the power to alter and amend its charter at pleasure, becomes part of the contract between the State and the corporators, and the exercise of it in no manner impairs the obligation of a contract within the meaning of the Constitution of the United

States; and the alteration of the charter may be as lawfully made by the substitution of a new charter as by the amendment of the old, provided such substituted charter be germane, and necessary to the objects and purposes for which the company was organized; and that the mere grant of additional powers auxiliary to the original design does not constitute a radical and fundamental change in the objects and purposes for which the original company was chartered. But a new charter which creates a *new* corporation is not binding upon a subscriber, unless he assents thereto. Thus, a member of a joint-stock company, under articles of association providing that the company shall become incorporated, is not, without his assent, bound by a charter obtained which creates a new corporation without making reference to any existing company, but which is accepted by vote of the association. *Wallingford Manufacturing Co. v. Fox*, 12 Vt. 304. Nor is it competent for the legislature to authorize a corporation, established for the purpose of building a certain railroad, to enforce subscriptions made under a previous charter granted for a *different* road. *Pittsburgh, &c. R. R. Co. v. Gazzam*, 32 Pa. St. 340.

a different mode for the service of process,<sup>1</sup> authorizing a reduction of capital, a change of terminus, a shortening of the line, and the

3. That the consolidated company thus established was a legal and valid corporation. 4. That it was of no importance to the case whether the original corporations were to be considered as absolutely merged in the new corporation, and therefore extinguished, or as retaining their individual corporate existence. 5. That the new corporation, being legally established and having capacity to receive an assignment of the property of the original corporations, and such assignment having been made on valuable consideration, the indebtedness of B. had been legally transferred to and become vested in the new corporation, and he was therefore no longer indebted to the original corporation. See also *Scotland v. Thomas*, 94 U. S. 682, where a similar rule was adopted where a county subscribed for stock, and a consolidation was afterwards effected under an amendment by the legislature, granted under a reservation of authority to amend, &c. *Smith v. Boston & Maine R. R. Co.*, 6 Allen (Mass.), 262; *Spencer v. Crawfordville R. R. Co.*, 7 Ind. 369; *Illinois, &c. R. R. Co. v. Boers*, 27 Ind. 185. The mere consolidation of one railroad company with another company, under a statute authorizing the consolidation of such companies, will not discharge or release a non-assenting subscriber for stock in one of the companies. *Nugent v. Supervisors*, 19 Wall. (U. S.) 241; *Cork & Youghal Railway Co. v. Patterson*, 37 Eng. L. & Eq. 398; *Nixon v. Brownlow*, 3 H. & N. 686; *Sparrow v. Railroad Co.*, 7 Ind. 369; *Bish v. Johnson*, 21 Ind. 299; *Hanna v. Cincinnati & Ft. Wayne R. R. Co.*, 30 id. 30; *Atchison, Colorado & Pacific R. R. Co. v. Comm. of Phillips County*. The general rule is illustrated by the opinion of the supreme court of the United States in the case of *Nugent v. Supervisors*, 19 Wall. (U. S.) 241, in which an attempt was made to avoid a subscription on the part of a county in the State of Illinois to the stock of a corporation, on the ground of a subsequent con-

solidation of such company with another. But an authority to consolidate existed at the time of the creation of the company, by an act of that State approved Feb. 28, 1854. The court say: "It must be conceded as a general rule that a subscriber to the stock of a railroad company is released from obligation to pay his subscription by a fundamental alteration of the charter. The reason of the rule is evident. A subscription is always presumed to have been made in view of the main design of the corporation, and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason it is held that such a change exonerates a subscriber from his liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain a company from applying the funds of the original organization to any project not contemplated by it. But while this is true as a general rule, it has no application to a case like the present. The consolidation . . . was no departure from its original design. The general statute of the State . . . authorized all railroad companies, then organized or thereafter to be organized, to consolidate their property and stock with each other, and with companies out of the State, whenever their lines connect with the lines of such companies out of the State. . . . The American authorities uniformly assert that the subscriber for stock is released from his subscriptions by a subsequent alteration of the organization or purposes of the company only *when such alteration is both fundamental and not provided for or contemplated by either the charter itself or the general laws of the State.*" See also *Hanna v. Cincinnati, &c. R. R. Co.*, 20 Ind. 30, where it was held that, as one of the purposes for which the corporation was

<sup>1</sup> *Railroad Co. v. Hecht*, 95 U. S. 168.

leasing of the road to another corporation,<sup>1</sup> authorizing the election of additional directors, and making different provisions as to the right of stockholders to vote upon their stock<sup>2</sup> or a change in the location and direction of the route,<sup>3</sup> or authorizing an extension of the road<sup>4</sup> or the construction of branch railroads,<sup>5</sup> — have been held not to impair the contract between the corporation and the subscriber; and the same may be said of any amendment which does not work a fundamental change in the enterprise, so as to change the contract liabilities and duties of the subscriber. But, even under a reservation of authority to alter, amend, or repeal a charter, the legislature does not acquire unlimited power over a corporation, to make alterations in the charter which impair its vested rights, nor does such reservation sanction a reckless invasion of rights of property, or an interference with contract obligations.<sup>6</sup> Therefore any change or alteration in the charter, after a subscription has been made, *which fundamentally changes the character, structure, or purpose of the corporation*, operates a change in the contract of subscription

organized was to consolidate, it would be presumed that the subscriber might have reasonably anticipated such a result, and he was held bound by his subscription. See, also, *Hamilton v. Hobart*, 2 Gray (Mass.), 543; *Gardner v. Hamilton Ins. Co.*, 33 N. Y. 421; *Sparrow v. Evansville, &c. R. R. Co.*, 7 Ind. 369; *Bish v. Johnson*, 21 id. 299; *Mowrey v. Indiana, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 78; *Blatchford v. Ross*, 54 Barb. (N. Y.) 42. Where a subscription is made after an agreement for a consolidation is entered into, but before it is filed in the office designated by law, is valid, although the agreement has not been filed. *McClure v. People's Freight R. R. Co.*, 90 Penn. St. 269. But a company formed by the consolidation of two or more companies cannot make a valid assessment upon subscriptions to the capital of one of the original corporations before the consolidation papers are filed as required by law, because the statute is the only source from which the consolidated company derives its existence. *Peninsular R. R. Co. v. Thorp*, 28 Mich. 506.

<sup>1</sup> *Troy & Rutland R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581.

<sup>2</sup> *Everhart v. West Chester, &c. R. R. Co.*, 28 Penn. St. 339.

<sup>3</sup> *Delaware R. R. Co. v. Thorp*, 1 Houst. (Del.) 149; *Midland Great Western Railway, &c. Co. v. Gordon*, 11 Jur. 440; *Central Plank Road Co. v. Clemons*, 16 Mo. 359. Even though it prejudices the subscriber's expectations of the benefits he would derive from the first location. *Irvin v. Turnpike Co.*, 2 Penn. 466; *Fry v. Lexington, &c. R. R. Co.*, 2 Met. (Ky.) 314.

<sup>4</sup> *Midland, &c. Railway v. Gordon*, *ante*; *Durfee v. Old Colony R. R. Co.*, 5 Allen (Mass.), 230; *Pacific R. R. Co. v. Hughes*, 22 Mo. 291; *Pacific R. R. Co. v. Renshaw*, 18 id. 210; *Del. & Atlantic R. R. Co. v. Irick*, 23 N. J. L. 321. And the assumption of new responsibilities. *Rice v. Rock Island, &c. R. R. Co.*, 21 Ill. 93; *Hayworth v. Junction R. R. Co.*, 13 Ind. 348.

<sup>5</sup> *Schenectady, &c. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Northern R. R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Bufalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 363.

<sup>6</sup> *Miller v. State*, 15 Wall. (U. S.) 478; *Oldtown, &c. R. R. Co. v. Veazie*, 39 Me. 471; *New Haven, &c. R. R. Co. v. Chapman*, 38 Conn. 56.



which releases the subscriber from his obligation to take and pay for the stock subscribed for by him, — notwithstanding such reservation of authority by the legislature.<sup>1</sup>

SEC. 40. **No definite rule can be given: Principal tests.** — No absolute rule can be laid down as to what is a material departure from the contract, — either in the location of a railroad line, as contrasted with the route defined by the original charter, or in reference to other matters, — which can be applied in all cases. Each case depends very much upon its own circumstances. The materiality of the change of the route, or other change in the prosecution of the enterprise, is a question of law, to be determined by the court, upon the facts ascertained by the jury or agreed upon by the parties.<sup>2</sup>

An alteration in the charter which consists only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute what may be regarded as substantially the original object of its creation, will not exonerate subscribers to the stock of the company.<sup>3</sup> And, as stated *supra*, the question is purely one of law for the court.

SEC. 41. **Immaterial changes.** — Amendments of the charter of an incorporated company which are necessary to carry into effect its main design, or which are useful and beneficial, or which merely enlarge the powers of the corporation without materially changing its original purpose, may be made without the consent of a share-

<sup>1</sup> *Everhart v. West Chester, &c. R. R. Co.*, 28 Penn. St. 339; *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray (Mass.), 548; *Oldtown & Lincoln R. R. Co. v. Veazie*, 39 Me. 571, 581; *Commonwealth v. Essex Co.*, 13 Gray (Mass.), 253; *Allen v. McKeen*, 1 Sum. (U. S. C. C.) 276; *Thompson v. Guion*, 5 Jones (N. C.) Eq. 113; *McCray v. Junction R. R. Co.*, 9 Ind. 358; *Marietta & Cincinnati R. R. Co. v. Elliott*, 10 Ohio St. 57; *Barnes v. Smith*, 10 N. Y. 550; *Troy & Rutland R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 604; *Kenosha, Rockford, & Rock Island R. R. Co. v. Marsh*, 17 Wis. 143; *Sage v. Dillard*, 15 B. Mon. (Ky.) 341; *Booe v. Junction R. R. Co.*, 10 Ind. 93; *Zabriskie v. Hackensack & New York R. R. Co.*, 18 N. J. Eq. 178; *Delaware R. R. Co. v. Thorp*, 5 Houst. (Del.) 454; *Woodruff v. The State*, 3 Ark. 285; *Herrick v. Town of Randolph*, 13 Vt. 525; *Hartford & New*

*Haven R. R. Co. v. Croswell*, 5 Hill (N. Y.), 383; *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Sheriff v. Lowndes*, 16 Md. 357; *Norris v. Trustees of Abington Academy*, 7 G. & J. (Md.) 7; *Regents of University of Maryland v. Williams*, 9 id. 366, 413; *Yarmouth v. North Yarmouth*, 34 id. 411; *Trustees, &c. v. Bradbury*, 11 id. 118; *Louisville v. President & Trustees of the University of Louisville*, 15 B. Mon. (Ky.) 667; *Commonwealth v. Cullen*, 13 Penn. St. 138; *Brown v. Hummel*, 6 id. 86; *Ellis v. Marshall*, 2 Mass. 277.

<sup>2</sup> *Witter v. Mississippi, &c. R. R. Co.*, 20 Ark. 463.

<sup>3</sup> *Pacific Railroad v. Hughes*, 22 Mo. 291; *Peoria & Oquawka R. R. Co. v. Elting*, 17 Ill. 429; *Rice v. Rock Island & Alton R. R. Co.*, 21 Ill. 93; *Terre Haute & Alton R. R. Co. v. Earp*, 21 Ill. 291.

holder; because the right to effectuate its plans and powers is a right incident to all corporations. *But an amendment which fundamentally changes the responsibilities and duties of the company, or which superadds an entirely new enterprise to that which was originally contemplated, may be resisted by the stockholders, unless such amendments are provided for in the charter itself, or in the general laws of the State in force at the time the act of incorporation was passed; and legislative sanction to such change cannot divest them of their rights.*<sup>1</sup>

Subscribers who do not assent to such unauthorized amendment may prevent the company from proceeding to act under it, and embarking in enterprises not contemplated by the original charter; but the mere passage of the amendment, conferring such additional powers upon the company, which it has not attempted, and may never attempt, to exercise, does not operate *per se* to exonerate a shareholder from liability to pay his subscription.<sup>2</sup> Nor will any *immaterial* amendment to the charter which does not change the contract relations of the parties, but which are merely auxiliary to the original purpose, defeat the subscriber's liability.<sup>3</sup> Thus, a change authorizing the issue of preferred stock for the purpose of raising means to make and equip the road as originally contemplated, which amendment is accepted by a majority of the stockholders, and such preferred stock issued, is not such a radical change as will exonerate an original subscriber who has not assented to the change;<sup>4</sup> neither will an amendment authorizing a change of name,<sup>5</sup> extending the time within which the road may be constructed,<sup>6</sup> authorizing

<sup>1</sup> *Fry v. Lexington, &c. R. R. Co.*, 2 Met. (Ky.) 314; *Peoria, &c. R. R. Co. v. Preston*, 35 Iowa, 115; *Everhart v. West Chester R. R. Co.*, 28 Penn. St. 339; *Southern Penn., &c. R. R. Co. v. Stevens*, 87 id. 190; *New Orleans, &c. R. R. Co. v. Harris*, 27 Miss. 517; *Stevens v. Rutland, &c. R. R. Co.*, 29 Vt. 545. *Hawkins v. Mississippi & Tennessee R. R. Co.*, 35 Miss. 688.

<sup>2</sup> *Fry v. Lexington & Big Sandy R. R. Co.*, 2 Met. (Ky.) 314; *Rutland, &c. R. R. Co. v. Thrall*, 35 Vt. 536.

<sup>3</sup> *Clearwater v. Meredith*, 1 Wall. (U. S.) 25; *Gray v. Monongahela Nav'n Co.*, 2 W. & S. (Penn.) 156; *London v. Brighton R. R. Co.*, 6 Bing. N. C. 135; *Peoria, &c. R. R. Co. v. Elting*, 17 Ill. 429; *Penn. & Ohio Canal Co. v. Webb*, 9

Ohio, 136; *New Orleans, &c. R. R. Co. v. Harris*, 27 Miss. 517; *Clark v. Monongahela Nav'n Co.*, 10 Watts (Penn.), 364; *Sprigg v. Western Union Tel. Co.*, 46 Md. 67.

<sup>4</sup> *Everhart v. West Chester, &c. R. R. Co.*, *ante*.

<sup>5</sup> *Del. & Atlantic R. R. Co. v. Irick*, 23 N. J. L. 321; *Eppes v. Mississippi, &c. R. R. Co.*, 35 Ala. 33; *Rutland, &c. R. R. Co. v. Thrall*, 35 Vt. 536.

<sup>6</sup> *Taggart v. Western Md. R. R. Co.*, 24 Md. 563; *Union, &c. Association v. Neill*, 31 Iowa, 95; *Poughkeepsie, &c. Plank Road Co. v. Griffin*, 24 N. Y. 150; *Agricultural Branch R. R. Co. v. Winchester*, 13 Allen (Mass.), 29. When a charter has expired because of the laches of the company, the liability of

a mortgage of the property,<sup>1</sup> giving to the directors certain powers formerly possessed by the stockholders,<sup>2</sup> changing the name of the corporation,<sup>3</sup> changing the mode of the service of process upon it,<sup>4</sup> regulating the mode in which payment shall be made;<sup>5</sup> and in fact,

subscribers is not revived by an act reviving the corporation, *Bailey v. Holles-ter*, 26 N. Y. 112, unless the subscriber by some decisive act, knowing the facts, assents to the amendment, and treats his subscription as outstanding. In *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 435, it was provided by the fourteenth section of the charter of a railroad corporation, granted in 1835, that such charter was to become void, "If said company shall not expend the sum of fifty thousand dollars upon said railroad, or way, within four years after the passage of this act." Nothing having been done under the charter, the legislature, in 1846, passed a resolution, by which it was renewed, and which provided that, if the company should not expend the sum of fifty thousand dollars upon said railroad, as was prescribed in the fourteenth section of the original charter, within two years from the rising of the general assembly at which the resolution was passed, or if they should not complete and put in operation a single, double, or treble way, as authorized in the charter, within four years after the rising of said general assembly, then the rights, privileges, and powers of the corporation should be null and void. It was held that the company were required both to expend the said sum of fifty thousand dollars, and to complete their road within the times respectively provided therefor. Where, however, after more than two years from the rising of the legislature, no part of the fifty thousand dollars having been expended, and previous to the session of the legislature of 1850, there were subscriptions to the stock of the company by the defendant and others, severally; and the company was organized and directors chosen, of whom the defendant was one; and subsequent to such organization the legislature, in 1850, again revived and renewed the charter, and extended the time limited in the fourteenth section; and after such renewal a meeting of the stockholders was convened by the

commissioners, in which the defendant took part, and at which a director was chosen in the place of one who had resigned, and six additional directors were chosen; and at a subsequent meeting of the directors on the same day, at which the defendant was present, an assessment was laid on the stock subscriptions, — it was held that such notice of the commissioners, the meeting of the stockholders, and the choice of directors, amounted to an acceptance of the charter, as renewed in 1850, and was a recognition and confirmation of all the preceding steps which resulted in the organization of the company, and constituted a new organization, as at the time of said last meeting. In an action to recover unpaid assessments upon shares of the stock, it appeared that the defendant was a party to, and co-operated actively with other subscribers and the commissioners in, the organization of the corporation, and participated in all the proceedings which led to it, — was one of the earliest and largest subscribers to the stock, and induced others to subscribe to it, — accepted the office of director, and acted as such in the meetings of the directors, and in the meetings at which the instalments were laid and the time of payment thereof extended; and upon these facts it was held that he was precluded from disputing the validity or regularity of the steps taken in the organization of the plaintiffs as a corporation and was liable for the assessment upon his stock.

<sup>1</sup> *Joy v. Jackson, &c. Plank Road Co.*, 11 Mich. 155.

<sup>2</sup> *East Tenn., &c. R. R. Co. v. Gammon*, 5 Sneed (Tenn.), 567; *Payson v. Stoeve*, 2 Dill. (U. S. C. C.) 427.

<sup>3</sup> *Reading v. Wedder*, 66 Ill. 80.

<sup>4</sup> *Railroad Co. v. Hecht*, 94 U. S. 108.

<sup>5</sup> *Illinois, &c. R. R. Co. v. Beers*, 27 Ill. 185; *Illinois, &c. R. R. Co. v. Zimmer*, 20 id. 64. But there is hardly room for doubt that it is entirely out of the power of the legislature to change the

any amendment which is merely auxiliary to the powers conferred by the charter, but which does not in any measure change the terms of the original contract.

SEC. 42. **Amendments not acted upon.** — It is no defence to an action for calls upon subscriptions, that amendments to the charter have been procured which work even fundamental changes in the corporation and contract, if the corporation has never acted upon them;<sup>1</sup> and a plea setting forth such an amendment as a bar to an action, which does not also set forth that it was accepted and acted on by the corporation, would be bad upon demurrer, because it does not show that the defendant sustains any injury therefrom.<sup>2</sup> Nor is he exonerated from liability to pay for his stock by reason of a change in the charter of the company, procured by a part of the stockholders, and adopted by the board of directors. *He must show that the change was ratified by a majority of the stockholders*, otherwise it does not become effective.<sup>3</sup>

The fact that the corporation has abandoned its business does not operate as a defence to an action to recover the subscription, where it appears that the corporation is in debt to an amount equal to the amount subscribed;<sup>4</sup> nor does the failure of the corporation to construct its works in the manner, or within the time, stated when the subscription was procured,<sup>5</sup> or to locate its business at the place contemplated by its charter, have that effect.<sup>6</sup> Nor in an action by a foreign corporation to recover an instalment due on stock, can it be set up in defence, that subsequently to the commencement of the suit, an order was made, in supplementary proceedings, at the suit of a creditor of the corporation, restraining the defendant from making payment; the defendant can be protected only by an actual payment to the receiver, under such order.<sup>7</sup>

time for the payment of calls, when such time was fixed in the charter or contract of subscription, because an amendment making such a change would go to the very essence of the contract, and would operate as a substitution of new terms thereto, which the legislature has no power to make.

<sup>1</sup> Rutland, &c. R. R. Co. v. Thrall, 35 Vt. 545; Fry v. Lexington, &c. R. R. Co., 2 Met. (Ky.) 314; Johnson v. Pensacola, &c. R. R. Co., 9 Fla. 299; Booker's Case, 18 Ark. 338; Hawkins v. Mississippi, &c. R. R. Co., 35 Miss. 688,

<sup>2</sup> Id.

<sup>3</sup> Rutland, &c. R. R. Co. v. Thrall, 35 Vt. 546; M. O. R. & R. R. Co. v. Gaster, 24 Ark. 97.

<sup>4</sup> Phenix Warehousing Co. v. Badger, 67 N. Y. 294.

<sup>5</sup> First National Bank v. Hurford, 29 Iowa, 579; Four Mile Valley R. R. Co. v. Bailey, 18 Ohio St. 208; Pickering v. Templeton, 2 Mo. App. 208.

<sup>6</sup> Courtright v. Deeds, 37 Iowa, 503.

<sup>7</sup> Glenville Woollen Co. v. Ripley, 43 N. Y. 206.

SEC. 43. *Miscellaneous grounds of Defence.* — It is a general rule that a corporation seeking to recover a subscription must show a strict compliance with the requirements of the laws under which it was constituted, where a defence is made on the ground of its failure in this respect.<sup>1</sup> But in some cases a compliance will be presumed, and in others it will be treated as waived by the subscriber. Thus, the payment of instalments on the stock subscribed for would usually be considered a waiver of the failure of strict performance of a conditional subscription and a recognition of the legal organization and existence of the corporation by the subscriber, so as to enable the company to recover the balance of the subscription.<sup>2</sup> And where a party subscribed for stock in and assisted in organizing a plank-road company, it was held that he could not avoid the payment of the stock subscribed for on the ground of a failure of the company to strictly conform to the law in completing its organization.<sup>3</sup> If a subscription to the stock of a railroad company is made upon condition that the road shall be permanently located over a certain route, if it is so located the condition is met, and the completion of the road is not a condition precedent to a right to recover the sub-

<sup>1</sup> *Nelson v. Blakey*, 47 Ind. 38.

<sup>2</sup> *Maltby v. Northwestern R. R. Co.*, 16 Md. 422.

<sup>3</sup> *Central Plank Road v. Clemens*, 16 Mo. 359; *Lane v. Brainerd*, 30 Conn. 565. Mere irregularities, either in the organization or action of the corporation, or even the commission of acts by it which might be seized upon by the State to forfeit its charter, will not release a subscriber from his subscription, because they cannot be inquired into collaterally and do not impair the obligation of the contract. *Lehman v. Warner*, 61 Ala. 455; *Upton v. Hansbrough*, 3 Biss. (U. S. C. C.) 417; *Conn. &c. R. R. Co. v. Bailey*, 24 Vt. 465; *Booker's Case*, 18 Ark. 338; *Kishacoquillas &c. Turnpike Co. v. McConahy*, 16 S. & R. (Penn.) 140; *Wight v. Shelby R. R. Co.*, 16 B. Mon. (Ky.) 4; *Montpelier &c. R. R. Co. v. Langdon*, 46 Vt. 284; *Oregon Central R. R. Co. v. Scoggin*, 3 Oregon, 161; *Hanover Junction R. R. Co. v. Haldeman*, 82 Penn. St. 36; *Kansas City Hotel v. Hunt*, 57 Mo. 126; *Bucksport &c. R. R. Co. v. Buck*, 68 Me. 81; *Parker v. Northern Central &c. R. R. Co.*, 33

*Mich.* 28; *Monroe v. Fort Wayne &c. R. R. Co.*, 28 id. 272; *Swartwout v. Michigan &c. R. R. Co.*, 24 id. 389; *Black River &c. R. R. Co. v. Clarke*, 25 N. Y. 208; *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. (Mass.) 576; *Buffalo &c. R. R. Co. v. Cary*, 26 N. Y. 75; *Dows v. Napier*, 91 Ill. 44; *Gill v. Kentucky &c. Mining Co.*, 7 Bush (Ky.), 635; *McCarthy v. Lavasche*, 89 Ill. 270; *Covington &c. Plank Road Co. v. Moore*, 3 Ind. 510; *Brownlee v. Ohio &c. R. R. Co.*, 18 id. 68; *Heaston v. Cincinnati &c. R. R. Co.*, 16 id. 275; *Stoops v. Greensburgh &c. Plank Road Co.*, 10 id. 47. Nor will a misuser or even a non-user of its franchises. *Mississippi &c. R. R. Co. v. Cross*, 20 Ark. 443; *Hammett v. Little Rock &c. R. R. Co.*, 20 id. 204. Nor the fact that the corporation or its officers have done illegal acts, not authorized by the charter. *Mississippi &c. R. R. Co. v. Gastner*, 20 Ark. 455; *Hays v. Ottawa &c. R. R. Co.*, 61 Ill. 422; *Merrill v. Reaver*, 50 Iowa, 404; *Johnson v. Crawfordville &c. R. R. Co.*, 11 Ind. 280; *Bucksport &c. R. R. Co. v. Buck*, 68 Me. 81.

scription.<sup>1</sup> It is no defence to an action for an assessment that a certificate has been issued reciting that it is "non-assessable," as that is merely a stipulation against assessments after the subscription is paid.<sup>2</sup> Nor is a stockholder released from his subscription because the directors have purchased from themselves or their friends property for the use of the corporation, at exaggerated prices in fraud of the company.<sup>3</sup> In the case last cited, the defendant signed a paper, with others, whereby he and they agreed to unite in the formation of a company for the exclusive use and sale of a patent, called "Noyce's patent for preserving fruit," each agreeing to take a certain number of shares. Afterward the defendant and nine others executed and acknowledged the certificate of incorporation required by law. The company, having failed to exercise its privileges within a year after its incorporation, was dissolved, and a receiver was appointed; and in an action by him against the defendant to recover the amount due upon his subscription, he defended upon the ground that the directors, in fraud of the stockholders, purchased the patent at a greatly exaggerated price; that he was not a stockholder; and that the company was never legally incorporated. As to the last two grounds of defence, the court held, according to the universal rule, that a corporation, when formed, may enforce payment of a subscription made *before* the corporation had a legal existence.<sup>4</sup> As to the defence that the defendant was released because of the fraud of the directors, the court, in denying the validity of the defence, by GILBERT, J., said: "Among the defences pleaded, one was that some of the promoters of the company, who signed the certificate of incorporation and were named therein as trustees, were intrusted with the duty of purchasing the patent right under which the business of the company was conducted; that they purchased it, in fact, of themselves and their associates, for the corporation, for the price of \$50,000, whereas the real price was \$16,000, and that the difference was divided between them and their associates. This, if true, was a gross fraud, and no proof of an actual intent to cheat, beside the matter itself, in such a case, is requisite to invalidate the transaction. The persons who undertook the duty of purchasing the patent thereby became agents of the corporation for that purpose. The same principles are applicable to them as govern the

<sup>1</sup> Berryman v. Cincinnati Southern Ry. Trustees, 14 Bush (Ky.), 755.

<sup>2</sup> Upton v. Trebilcock, 91 U. S. 45.

<sup>3</sup> Dorris v. French, 4 Hun (N. Y.), 292.

<sup>4</sup> Buffalo, &c. R. R. Co. v. Hatch, 20 N. Y. 161; Burr v. Wilcox, 22 id. 551; Strong v. Wheaton, 38 Barb. 622.

relation of trustee and *cestui que trust*. They were bound not to do anything which could place them in a position inconsistent with the interest of their principal. Agents are not permitted to become secret venders of property which they are authorized to buy for their principals, or indeed to deal validly with their principals in any case, except where there is the most entire good faith and full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition. Nor will an agent, employed to purchase, be permitted, unless by plain and express consent of his principal, to make any profit out of the transaction.<sup>1</sup> If those who made the purchase for \$16,000 were at the time acting as projectors or promoters of the company, they can make no profit at the company's expense by a purchase and resale.<sup>2</sup> The injury occasioned by the alleged fraud, however, was done to the corporation, and not to the defendant. It constitutes no defence to an action at law, brought by the corporation or its receiver, to recover his subscription to the capital stock. The only mode of making it available to the defendant would be by a bill in equity in which the persons accused of fraud, as well as the corporation, would be necessary parties." The fact that the directors have released some of the subscribers from their subscription does not necessarily discharge others, although circumstances may exist which will have that effect.<sup>3</sup> The failure of the agent of a corporation to deliver to it the original subscription-paper does not discharge those who subscribed;<sup>4</sup> nor that the commissioners appointed to receive subscriptions failed to obey the provisions of the charter requiring them to exact a certain per cent in cash from each subscriber;<sup>5</sup> nor that a greater amount of subscriptions, in the aggregate, have been received than is authorized;<sup>6</sup> nor that the corporate property has been seized on execution, or by the State.<sup>7</sup>

SEC. 44. **Personal disadvantage to Subscriber, — not enough.** — The fact that a subscriber, at the time he subscribed for stock, expected

<sup>1</sup> Story's Eq. Jur. § 315; Dally v. Wonham, 33 Beav. 154; Bentley v. Craven, 18 id. 75; Tyrrell v. Bank of London, 10 H. L. Cas. 26; Beck v. Kantorowitz, 3 K. & J. 230.

<sup>2</sup> Foss v. Harbottle, 2 Hare, 489; Densmore Oil Co. v. Densmore, 64 Penn. St. 49; McElhenny's Appeal, 61 id. 188.

<sup>3</sup> Memphis Branch R. R. Co. v. Sullivan, 57 Ga. 240; Macon, &c. R. R. Co. v. Vason, id. 314.

<sup>4</sup> Pickering v. Templeton, 2 Mo. App. 424.

<sup>5</sup> Blair v. Rutherford, 31 Tex. 465; Garrett v. Dillsburgh, &c. R. R. Co., 78 Penn. St. 465.

<sup>6</sup> Oler v. Baltimore, &c. R. R. Co., 41 Md. 583.

<sup>7</sup> Mullins v. North, &c. R. R. Co., 54 Ga. 580.

to derive a pecuniary or other advantage from the construction of the road near his property, and because of a change in the location of the road, which by the charter the company was invested with the power to make, these expected advantages are lost to him, affords no ground for relief from his subscription,<sup>1</sup> unless the charter fixes the location,<sup>2</sup> or the subscription is made upon condition that it shall be located at a certain point.<sup>3</sup>

**SEC. 45. Irregularities, etc., in Formation and Action of the Corporation.**— It has already been stated that mere irregularities in the formation of a corporation, or even the doing by it of acts which are illegal, and would justify the State in proceeding against it for a forfeiture of its charter, will not in any measure impair its remedies against individuals;<sup>4</sup> consequently, as such matters cannot be inquired into collaterally, they cannot be set up to defeat the liability of a subscriber.<sup>5</sup> Under this rule, it has been held that the fact that work upon the construction of the road has been suspended;<sup>6</sup>

<sup>1</sup> Fry v. Lexington, &c. R. R. Co., 2 Met. (Ky.) 314; Delaware R. R. Co. v. Thorp, 1 Houst. (Del.) 149; Bauct v. Alton, &c. R. R. Co., 13 Ill. 504.

<sup>2</sup> Kenosha, &c. R. R. Co. v. Marsh, 17 Wis. 13.

<sup>3</sup> Moore v. New Albany, &c. R. R. Co., 15 Ind. 78; Danbury, &c. R. R. Co. v. Wilson, 22 Conn. 435; Bauct v. Alton, &c. R. R. Co., 13 Ill. 504.

<sup>4</sup> See chapter 1, § 8, "DE FACTO CORPORATIONS." If the company has done enough to become a *de facto* corporation, its power to enforce its contract or other rights cannot be questioned by individuals. Morse v. Fort Wayne, &c. R. R. Co., 28 Mich. 272; Hanover Junction, &c. R. R. Co. v. Grubb, 82 Penn. St. 86. And a person who subscribes for stock directly to the corporation is at least estopped from questioning its existence or capacity. Parker v. Northern R. R. Co., 33 Mich. 23; Montpelier, &c. R. R. Co. v. Langdon, 46 Vt. 284. A party who has voted on his stock or participated in any of the corporate acts, or in any manner recognized the corporation, would most clearly be estopped. St. Charles Mfg. Co. v. Britten, 2 Mo. App. 290; Occidental Ins. Co. v. Gauzhorn, 2 id. 205; Phenix Warehousing Co. v. Badger, 67 N. Y. 294. Thus in Maltby v. Northwestern, &c. R. R.

Co., 16 Md. 422, it was held that, as a general rule, strict compliance with its charter, as to organization, must be shown by a corporation seeking to enforce payment of subscriptions to its stock; but in some cases compliance will be presumed, and in others it may be waived; and payment of instalments on a subscription to its stock is at least a sufficient recognition of the legal existence and organization of a corporation by the subscriber so paying to enable it to recover the remaining instalments from him.

<sup>5</sup> Lehman v. Warner, 61 Ala. 455; Wight v. Shelby R. R. Co., 16 B. Mon. (Ky.) 4; Dorris v. French, 4 Hun (N. Y.), 292; Rice v. Rock Island, &c. R. R. Co., 12 Ill. 93; McCarthy v. Lavasche, 89 Ill. 270; Kishacoquillas, &c. T. Co. v. McConahy, 16 S. & R. (Penn.) 140; Dows v. Napier, 91 Ill. 44; Macon, &c. R. R. Co. v. Vason, 57 Ga. 314; McCully v. Pittsburgh, &c. R. R. Co., 32 Penn. St. 25; Maltby v. Northwestern Va. R. R. Co., 16 Md. 422; Black River, &c. R. R. Co. v. Barnard, 81 Barb. (N. Y.) 258.

<sup>6</sup> Miller v. Pittsburgh, &c. R. R. Co., 40 Penn. St. 237. But if the enterprise is abandoned, or the company ceases to prosecute the work and attempts to misapply the funds, a subscriber may resort to a court of equity for an injunction, and,



or that it was not commenced or completed within the time required in the charter;<sup>1</sup> that the officers of the company have been guilty of serious mismanagement of its affairs;<sup>2</sup> or that they were illegally elected;<sup>3</sup> or have done illegal acts;<sup>4</sup> or that it has violated its charter;<sup>5</sup> or that the company has taken large subscriptions payable in lands, at enormous prices;<sup>6</sup> or that other subscribers were released, or their stock was forfeited;<sup>7</sup> or that insufficient notice of the election of directors was given;<sup>8</sup> or that, after the subscription, a by-law was adopted that required the subscriber to pay for his stock before he could vote on corporation matters,<sup>9</sup> — affords no ground for a defence at law against an action to recover a subscription. The only remedy which a subscriber has against the illegal, unauthorized, or wrongful acts of the directors and managers of a corporation, especially a railroad corporation, is through the intervention of a court of equity. Parties have sometimes interposed as a defence to actions to recover their subscriptions the fact that the corporation has become insolvent, or that the enterprise has been finally abandoned; but neither ground affords any defence to an action at law whatever,<sup>10</sup> except in the latter instance, where the subscriber can show that no funds are

under such circumstances, the relief will not be denied. *Illinois Grand Trunk R. R. Co.*, 29 Ill. 237. Where the charter of a railroad company does not authorize a consolidation of the road with another, but an act is subsequently procured giving such power to the company, *any* stockholder who dissents therefrom is entitled to an injunction against such consolidation. *Mowrey v. Indianapolis, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 78; *Tuttle v. Michigan Air Line R. R. Co.*, 35 Mich. 247.

<sup>1</sup> *Taggart v. Western Md. R. R. Co.*, 24 Md. 563; *Smith v. Gowar*, 2 Duv. (Ky.) 17.

<sup>2</sup> *Merrill v. Reeves*, 50 Iowa.

<sup>3</sup> *Johnson v. Crawfordsville, &c. R. R. Co.*, 11 Ind. 280; *Bucksport, &c. R. R. Co. v. Buck*, 68 Me. 81; *Eakright v. Logansport, &c. R. R. Co.*, 13 Ind. 404.

<sup>4</sup> *Mississippi, &c. R. R. Co. v. Gaster*, 24 Ark. 96; *Hannibal, &c. Plank Road Co. v. Menfee*, 25 Mo. 547; *Hays v. Ottawa R. R. Co.*, 61 Ill. 422; *Mississippi, &c. R. R. Co. v. Cross*, 20 Ark. 443.

<sup>5</sup> *Little v. O'Brien*, 9 Mass. 423; *Han-*

*nibal, &c. Plank Road Co. v. Menfee*, 25 Mo. 247; *Smith v. Tallassee, &c. Co.*, 30 Ala. 650.

<sup>6</sup> The charter permitting subscriptions in lands to be taken. *Hornady v. Indiana, &c. R. R. Co.*, 9 Ind. 263; *Maccow v. Indiana, &c. R. R. Co.*, 9 id. 262.

<sup>7</sup> *N. O. &c. R. R. Co. v. Lea*, 12 La. An. 388; *Dorman v. Jacksonville, &c. R. R. Co.*, 7 Fla. 265.

<sup>8</sup> *Central Plank Road Co. v. Clemens*, 16 Mo. 399; *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546.

<sup>9</sup> *New Albany, &c. R. R. Co. v. McCormick*, 10 Ind. 499; *Chandler v. Northern Cross R. R. Co.*, 18 Ill. 190.

<sup>10</sup> *Morgan County v. Thomas*, 76 Ill. 120; *Hardy v. Merriweather*, 14 Ind. 293. And the appointment of a receiver after the action is commenced does not abate the suit, but it may be continued in the name of the corporation, and prosecuted by the receiver. *Phenix Warehousing Co. v. Badger*, 6 Hun (N. Y.), 297; *Tracy v. First National Bank of Selma*, 37 N. Y. 523; *Albany, &c. Ins. Co. v. Van Vranken*, 42 How. Pr. (N. Y.) 281.

needed to pay the corporate debts. The subscriber, if he has any remedy in such cases, which will always depend upon the peculiar facts of each case, must seek it in a court of equity.<sup>1</sup>

SEC. 46. **Fraud as a defence.** — Where a person has been induced to subscribe for stock in a corporation by reason of false and fraudulent representations made to him by the officers or agents of the company, he may set it up as a defence to an action to recover his subscription;<sup>2</sup> and he may prove the declarations of the officers made at the time of the subscription, for the purpose of establishing such fraud;<sup>3</sup> unless he was himself one of the fraudulent originators of the company, or has participated in it.<sup>4</sup> And if he has paid money under his subscription, he may recover it back in an action for money had and received.<sup>5</sup> But it must appear that he relied upon the truth of the representations;<sup>6</sup> that the person making them

<sup>1</sup> In *Doncaster, &c. Building Society, L. R. 4 Eq. 579*, it was held that, as it was shown that an assessment was unnecessary, there being a surplus over all debts and the company winding up, a shareholder was entitled to relief in equity against the assessment.

<sup>2</sup> *New Orleans, Opelousas, &c. R. R. Co. v. Williams*, 16 La. An. 315; *Jennings v. Broughton*, 17 Jur. 905. And this is so, even though the assessment is made for the purpose of paying the expenses of the company. *Brockwell's Case*, 29 L. T. 375; *Litchfield Bank v. Peck*, 29 Conn. 384. But see *Ogilvie v. Knox Ins. Co.*, 23 How. (U. S.) 380.

<sup>3</sup> *Henderson v. R. R. Co.*, 17 Tex. 560; *Rives v. Plank Road Co.*, 30 Ala. 92; *Hester v. Memphis, &c. R. R. Co.*, 82 Miss. 378.

<sup>4</sup> *Litchfield Bank v. Peck*, *ante*.

<sup>5</sup> *Atkinson v. Pocock*, 12 Jur. 60; *Jarrett v. Kennedy*, 6 C. B. 319; *Woutner v. Shairp*, 4 id. 404. The promoters of a proposed corporation who made the false representations, as well as the company itself, are liable to an action for damages, for deceit in inducing the plaintiff to subscribe. *Paddock v. Fletcher*, 42 Vt. 389. But to warrant an action to recover back a subscription, the case must show some misrepresentation or fraud, or an entire failure in the objects and purposes of the company. *Kelsey v. Northern Light Oil Co.*, 54 Barb. 111.

<sup>6</sup> *Mitchell v. Deeds*, 49 Ill. 416; *Linnett v. Males*, 38 Iowa, 25; *Melendy v. Keen*, 89 Ill. 395; *Kisch v. Central Ry. of Venezuela*, 3 De G. J. & S. 122. A subscription contract by W. provided "that not exceeding £700,000 should be raised." Afterwards fictitious subscriptions were taken to make up the amount to £700,000. It was held that such subscriptions, not being *bona fide*, were no ground for the recovery of the deposit paid upon the subscription of W. *Watts v. Salter*, 10 C. B. 477. A statement on the part of the agent of a corporation as to the pecuniary condition and prospect of his corporation will not avoid a subscription, unless the falsity and fraud of such representations are clearly shown, and unless it is manifest that the condition of the enterprise constituted a material inducement to the subscription. To avoid a subscription on the ground of false representation of an agent, it must be shown that the statement was not uttered as an opinion, but as an ascertained and existing fact. It must not only be false in fact, but must also be either known to be so by the party uttering it, or his position must be one that made it his duty to know the truth. *Selma, Marion, and Memphis R. R. Co. v. Anderson*, 51 Miss. 829. Subscriptions obtained by fraudulent representations of the plaintiffs, or to which they were privy, will not be enforced. *Davis v. Dumont*, 37 Ia. 47; *Melendy v. Keen*, 89 Ill. 395.

had authority to act for the corporation in obtaining subscriptions ;<sup>1</sup> and that the falsity of the representations was known to the agent making them, or ought to have been known by him.<sup>2</sup>

Where a "prospectus" of a company is issued by the directors, to induce persons to subscribe for stock, they are regarded as so far the agents of the company that, if the statements therein are false and fraudulent, the contract will be set aside in a court of equity upon proper application by a subscriber. The proper inquiry in such case is, "whether the prospectus, so issued, contains such representations or such suppression of existing facts, that, if the real truth had been

Thus, a farmer and his wife, on the line of a proposed railroad, subscribed to stock in the road and mortgaged their farm, upon representations made to them by agents of the road and others, in a time of excitement got up at public meetings, that the road would prove a lucrative investment of money, a very profitable thing to the neighborhood, etc. The making of the road was begun, and, after a good deal of money had been laid out, it was stopped for want of funds. The mortgage thus got was assigned to a director of the road who was a large creditor of the road. It was held, on a bill by him to foreclose, that he was to be taken as an innocent holder for value ; and that he was entitled to a decree. *Sawyer v. Prickett*, 19 Wall. (U. S.) 146. So, where a railroad company was seeking to procure local aid for the construction of its road, and in pursuance of this plan its board of directors at a regular meeting adopted a blank form for notes for the purpose of obtaining private subscriptions ; and by the order of the board a number of these blanks were delivered to one of the members of the board who was a Swede ; who, having great influence among the population of that nationality in his neighborhood, employed one C., another Swede of influence, who could not read or write English well, to take the blanks and obtain from the Swedish population in his town subscriptions to the railroad ; and C., under the direction and with the consent of said director, made positive assertions of fact to a Swede farmer, who could not read or understand English thoroughly, as to the purport and meaning of the language of the notes, which assertions of fact were

false, though believed by the director and C. at the time to be true, and such Swede was induced thereby to sign the note, — such notes, being obtained by false assertions of fact, are fraudulent and cannot be collected. *Wickham v. Grant*, 28 Kans. 517. But where the plea averred that the inducement to subscribe for stock was to procure a competing line to another named road, and the agent at the time represented that the road should remain a competing line, but when completed it was leased to the competing road, it was held that this plea was bad on demurrer, as it failed to aver that the agent *falsely and fraudulently made the representations*. Fraud must be pleaded and proved. *Hays v. Ottawa, Oswego, and Fox River Valley R. R. Co.*, 61 Ill. 422, 1871 ; 12 Amer. Ry. Rep. 454. *Oregon Central R. R. Co. v. Scoggin*, 3 Oregon, 161 ; *Burlington, &c. R. R. Co. v. Palmer*, 42 Iowa, 222.

<sup>1</sup> *Goodrich v. Reynolds*, 31 Ill. 490 ; *Fort Wayne, &c. R. R. Co. v. Deane*, 10 Ind. 563 ; *Penobscot R. R. Co. v. White*, 41 Me. 512.

<sup>2</sup> *Heyman v. European, &c. Ry. Co.*, L. R. 7 Eq. 152 ; *Burns v. Pennell*, 2 H. L. Cas. 497 ; *Selma, &c. R. R. Co. v. Anderson*, *ante* ; *Waldo v. Chicago, &c. R. R. Co.*, 14 Wis. 575 ; *Davis v. Dumont*, 37 Iowa, 47 ; *Burlap v. Milwaukee*, 18 Wis. 431 ; *Nugent v. Cincinnati, &c. R. R. Co.*, 2 Dis. (Ohio) 302 ; *Henderson v. San Antonio, &c. R. R. Co.*, 17 Tex. 560 ; *Water Valley Mfg. Co. v. Leaman*, 53 Miss. 655 ; *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188 ; *Vawter v. Ohio, &c. R. R. Co.*, 14 Ind. 174.

stated, it is reasonable to believe the plaintiff would not have entered into the contract; that is, that he would not have taken the shares allotted to him, and those which he purchased." But the omission to state in a prospectus the number of shares taken by the directors, or other persons in their interest, is no such fraud as will enable a subscriber to avoid his subscription.<sup>1</sup>

In another English case,<sup>2</sup> in an action by an allottee of a railway company for the recovery of his deposit, it appeared that the company issued a prospectus, which stated the capital to consist of 60,000 shares of a certain value; and the plaintiff, after having paid his deposit, executed the subscriber's agreement, which contained the usual terms as to the disposition of the deposits. At the time when he executed the deed, the deposits upon the whole number of shares allotted had not been paid, which fact was not communicated to him. It was held that, as the withholding of the above fact did not amount to such a fraud as to avoid the deed, the plaintiff was not entitled to recover back his deposit.

As to what amounts to fraud, must depend necessarily upon the circumstances of each case. But it may be said that, if a person is induced to subscribe for stock by an officer of the corporation, upon an agreement which the officer had authority to make, it is obligatory; and if he has paid for the stock either in whole or in part, he may recover back the amount, if the agreement was not performed.<sup>3</sup> But parol representations or agreements made at the time of subscribing for stock in a corporation, which are *inconsistent with the written terms of the subscription*, are inadmissible, because inoperative and void;<sup>4</sup> for their admission would violate that salutary and well-

<sup>1</sup> Pulsiford v. Richards, 17 Jur. 865; Ross v. Estates Investment Co., 36 Law J. (N. S.) 54; Heyman v. European, &c. Railway Co., L. R. 7 Eq. 154; Central Railway Co. v. Kisch, L. R. 2 H. L. 99; Hallows v. Fernie, L. R. 3 Eq. 520; Atlanta, &c. R. R. Co. v. Hodnett, 36 Ga. 669. A contract to take shares in a company cannot be set aside because it was founded on a prospectus which contains exaggerated views of the advantages of the company, but does not contain any material misstatement of fact. Where, therefore, a prospectus stated that a certain invention which it was the object of the company to work had been tested, and that according to the experiments the ma-

terial could be produced at a specified cost, but that it was the intention to test the invention further, and the invention turned out worthless, and it appearing that there had been some testing, it was held that this was not such a misrepresentation as would enable a purchaser of shares to set aside the contract. Denton v. Macniel, L. R. 2 Eq. 352.

<sup>2</sup> Vane v. Cobold, 1 Exchq. 798.

<sup>3</sup> Weeden v. Mud River R. R. Co., 14 Ohio, 563; Crossman v. Penrose Ferry Bridge Co., 26 Penn. St. 69.

<sup>4</sup> Connecticut & Passumpsic R. R. Co. v. Bailey, 24 Vt. 465; Blodgett v. Morrill, 2 Vt. 509; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Johnson v. Crawfordsville,

settled general rule, that parol evidence is not admissible to alter or vary the plain terms of a written contract. Therefore where the charter or the contract of subscription sets forth what the corporation may or will do, any parol agreement or representation that it will do something else is not admissible.

It has been held that representations as to what the company would do;<sup>1</sup> as to the condition of the company and expenses of the

&c. R. R. Co., 11 Ind. 280; *Smith v. Plank Road Co.*, 30 Ala. 650. Agreements secretly made with subscribers for stock in a company, that their subscriptions shall be merely colorable, or dischargeable on part payment, are a fraud upon other subscribers, and the subscriptions should be enforced without regard to them. *Downie v. White*, 10 Wis. 176; *Robinson v. Pittsburgh & Connellsville R. R. Co.*, 32 Penn. St. 334. To similar effect are, *White Mountains R. R. Co. v. Eastman*, 34 N. H. 124; *Mann v. Cooke*, 20 Conn. 178; *New Albany R. R. Co. v. Fields*, 10 Ind. 187; *New Albany R. R. Co. v. Slaughter*, id. 218. An individual sued upon a stock subscription cannot set up, as a defence to the action, that by means of a fraudulent agreement with the directors of the company other subscribers were allowed to obtain their stock upon more favorable terms. Such an arrangement is a nullity, and of no avail to the parties in whose behalf it was made. *Anderson v. Newcastle & Richmond R. R. Co.*, 12 Ind. 376. Thus, where commissioners appointed to receive subscriptions were required by the statute to apportion the stock among the subscribers at their discretion, and in a manner most advantageous to the interests of the company, A. advanced to B. \$1,000, to be applied in making the necessary payments upon subscriptions which B. was to procure to be made by third persons for A.'s benefit, under an arrangement that immediately upon their receiving a distribution of the stock it was to be transferred to A. It was held that A.'s object being to defeat the statute by concealing the fact that he was the real subscriber, the contract was void, and he could not recover back his advance. *Perkins v. Savage*, 15 Wend. (N. Y.) 412.

<sup>1</sup> *Johnson v. Crawfordsville, &c. R. R.*

*Co.*, 11 Ind. 280; *Mississippi, &c. R. R. Co. v. Cross*, 20 Ark. 443; *Evansville, &c. R. R. Co. v. Posey*, 12 Ind. 363; *Eakright v. Logansport, &c. R. R. Co.*, 13 id. 404; *Carlisle v. Evansville, &c. R. R. Co.*, id. 477. Where, in an action upon a subscription conditioned upon the completion of a railway, the declaration avers that the contract was made upon a sufficient consideration, *and the antecedent negotiations out of which the contract grew* are relied on as constituting such consideration, it is proper to allow such preliminary negotiations to be very fully disclosed, and a wide discretion in that regard must be left with the trial judge. *Tower v. Detroit, &c. R. R. Co.*, 34 Mich. 328. So, where the original agreement was entire, and a part only was reduced to writing, parol evidence of the agreement is admissible. *Bross v. Cairo, &c. R. R. Co.*, 9 Brad. (Ill.) 363. Declarations of an agent in relation to the route of the road cannot be shown in defence to an action upon the subscription, because the effect would be to engraft a condition upon the subscription by parol, whereas if the subscriber intended to make his subscription conditional upon the route taken, he should have embodied it in his subscription. *Mississippi, Ouchita, &c. R. R. Co. v. Cross*, 20 Ark. 443. Nor can such representations be set up in defence, when they merely relate to the legal effect of the subscription. *Clem v. Newcastle, &c. R. R. Co.*, 9 Ind. 488. Nor when the subscriber has equal means of information with the agent. Thus, in an action upon a subscription the answer alleged, 1. That the soliciting agent represented that in the book he produced there were articles of agreement by which the subscriber might pay for stock in money or in ties for the road at the rate of, &c., and the defendant relying, &c., subscribed without reading,

enterprise;<sup>1</sup> as to the amount of stock which has been subscribed;<sup>2</sup> as to the future prospects and value of the enterprise,<sup>3</sup>— do not amount to sufficient evidence of fraud, as such statements are merely statements of opinion, which, although erroneous, have no tendency to establish fraud on the part of the person making them.<sup>4</sup>

&c., and that said representations were false. 2. That a verbal entire contract was made, a part only of which was reduced to writing; that it was agreed that the defendant should subscribe two shares, and might pay the same in ties at the rate of, &c., on demand, and the part reduced to writing is that stated in the complaint, and the other part defendant demands to prove by parol. The latter was for the payment of money absolutely, upon call. It was held, 1. That the representations were not peculiarly within the knowledge of the plaintiffs, nor such as the defendant might rely upon. 2. That the demand to make parol proof was, in effect, a demand to contradict or vary a written instrument by proof of a verbal contemporaneous agreement, which cannot be done. *Thornburg v. Newcastle & Danville R. R. Co.*, 14 Ind. 499. If a subscriber is induced to take stock in a railway company *by false representations which are not fraudulent, and which form no part of the contract of subscription*, he is not entitled to be relieved from the payment of the amount of his subscription. But if he acts upon such representations to his injury, he is entitled to relief, although they may have been innocently made. *Cunningham v. Edgefield & Kentucky R. R. Co.*, 2 Head (Tenn.), 23. Where subscribers to the stock of a railway company had given their notes for the amounts of subscription, payable when the road should be completed, but were subsequently induced to take up these notes and to give new ones, payable in four years, in order to enable the company to carry out a contract for the completion of the road, and upon the confident but honest expression of opinion by its officers, that if they would do so, the road would be completed under such contract in less than four years, it was held, that although the said contract for building the road was afterward, and before anything had been done under it, aban-

doned by the contractor, and the road has never been completed, yet the subscribers are liable upon their said new notes. *Four Mile Valley R. R. Co. v. Bailey*, 18 Ohio St. 208. Where certain representations as to what a railway company would do were made at a public meeting, and upon the strength of these representations, A. conveyed land to the company, with the understanding that he was to have the advantages as stated in such meeting, there being no other consideration, it was held, that upon the failure of the company to carry out the promises made at that meeting, A. was entitled to a cancellation of his deed. *Atlanta and West Point R. R. Co. v. Hodnett*, 36 Ga. 669.

<sup>1</sup> *Walker v. Mobile & Ohio R. R. Co.*, 34 Miss. 245; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Andrews v. Ohio, &c. R. Co.*, 14 Ind. 169.

<sup>2</sup> *Hardy v. Merriwether*, 14 Ind. 203; *Bish v. Bradford*, 17 Ind. 490; *Brownlee v. Ohio, &c. R. R. Co.*, 18 id. 68; *Parker v. Thomas*, 19 id. 213; *Goodrich v. Reynolds*, 31 Ill. 490.

<sup>3</sup> *Vawter v. Ohio & Mississippi R. R. Co.*, 14 Ind. 174; *Hardy v. Merriwether*, id. 203; *Salem Mill Dam Corporation v. Ropes*, 9 Pick. (Mass.) 187.

<sup>4</sup> *White Mountain, &c. R. R. Co. v. Eastman*, 34 N. H. 124; *Blodgett v. Morrill*, 20 Vt. 509; *Tuckerman v. Brown*, 83 N. Y. 297; *Swartara R. R. Co. v. Brune*, 6 Gill (Md.), 41; *Upton v. Hansbrough*, 3 Biss. (U. S. C. C.) 417; *Jewett v. Valley R. R. Co.*, 34 Ohio St. 601; *Henry v. Vermillion, &c. R. R. Co.*, 17 Ohio, 187; *Noble v. Colendar*, 20 Ohio St. 199; *Syracuse, &c. R. R. Co. v. Gere*, 4 Hun (N. Y.), 392; *Litchfield Bank v. Church*, 29 Conn. 187; *Sanger v. Upton*, 91 U. S. 56; *Oregon Central R. R. Co. v. Scoggin*, 3 Oregon, 161; *Dill v. Wabash Valley R. R. Co.*, 21 Ill. 91; *Wight v. Shelby R. R. Co.*, 16 B. Mon. (Ky.) 4; *Miller v. Wild Cat Gravel Road*, 57 Ind. 241; *McAllister v.*

A contract of this character may be avoided upon the ground that it was induced by fraud, upon the same principles as apply in the case of individuals. The corporation cannot retain the benefit of a contract which its agents have procured by fraud. But the subscription is not absolutely void, but only voidable; and until disaffirmed it is valid. And to obtain relief against it, the case must show that the subscriber was not misled through his own negligence and omission of prudent inquiries, and that he acted promptly in disaffirming the contract, on acquiring knowledge of the fraud.<sup>1</sup> Thus, where a memorandum of association (which was registered) differed from the prospectus on which it professed to be founded, and on which, as setting forth the true objects of the association, A. had become a shareholder, it was held that although he, on discovering the difference, might have repudiated his shares, he could not, after the failure of the company, relieve himself from liability to contribute to the debts of the association, on the ground that he had been ignorant of something which, with proper diligence, he might have known. It is the duty of a person taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of the memorandum of association. He must take the consequences of neglect.<sup>2</sup>

Indianapolis &c. R. R. Co., 15 Ind. 11; McCarthy v. Selinsgrove, &c. R. R. Co., 87 Penn. St. 332; Vicksburgh, &c. R. R. Co. v. McKean, 12 La. An. 638; Greenville, &c. R. R. Co. v. Smith, 6 Rich. (S. C.) 91; Walker v. Mobile, &c. R. R. Co., 34 Miss. 245; Ellison v. Mobile, &c. R. R. Co., 36 Miss. 572; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Thornborough v. Newcastle, &c. R. R. Co., 14 Ind. 499; Brownlee v. Ohio, &c. R. R. Co., 18 Ind. 68; Cass v. Pittsburgh, &c. R. R. Co., 80 Penn. St. 31; N. E. R. R. Co. v. Rodrigues, 10 Rich. (S. C.) 278; Milwaukee, &c. R. R. Co. v. Field, 12 Wis. 346; Corwith v. Culver, 69 Ill. 502; Bish v. Bradford, 17 Ind. 490; Vawter v. Ohio, &c. R. R. Co., 14 Ind. 174; Gelpeke v. Blake, 15 Iowa, 387; Melvin v. Lamar Ins. Co., 80 Ill. 446; McRae v. Atlantic, &c. R. R. Co., 5 Jones (N. C.), Eq. 395; Martin v. Pensacola, &c. R. R. Co., 8 Fla. 370; Johnson v. Pensacola, &c. R. R. Co., 9 id. 299; Cincinnati, &c. R. R. Co. v. Pearce, 28 Ind. 502.

<sup>1</sup> Upton v. Englehart, 3 Dill. (U. S. S. C.) 496; Davis v. Dumont, 37 Iowa, 47; Water Valley Manuf. Co. v. Seaman, 53 Miss. 655; Custar v. Titusville Gas, &c. Co., 63 Penn. St. 381; Upton v. Tribilcock, 91 U. S. 45; Hughes v. Antietaam Mfg. Co., 34 Md. 316. Where a person subscribed for shares upon representations contained in a prospectus, which he afterwards discovered to be false, and subsequently to the discovery he instructed his broker to sell the shares, it was held that his name could not be removed from the register. *Re Hop & Malt Exchange, &c. Co.*, L. R. 1 Eq. 483. That the right to repudiate must be seasonably asserted, see *Chubb v. Upton*, 95 U. S. 665; *Cunningham v. Edgefield, &c. R. R. Co.*, 2 Head (Tenn.), 20; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Parks v. Evansville, &c. R. R. Co.*, 23 Ind. 567; *Dynes v. Shapper*, 19 Ind. 165.

<sup>2</sup> *Oakes v. Turquand*, L. R. 2 H. L. 325.

Parol declarations made by officers of a proposed company on public occasions, if admissible at all to invalidate a subscription for stock, cannot avail a subscriber who does not show that such declarations amounted to fraud on the part of the company, inducing error on his own part when he subscribed.<sup>1</sup> In other words, it must be shown that the person making the representations was the authorized agent of the corporation; the mere circumstance that he was an officer or stockholder is not enough.<sup>2</sup> Thus, one of the commissioners appointed by an act incorporating a railroad company to take subscriptions, the board consisting of five, has no authority to give any assurance to subscribers as to the route which shall be adopted by the company in the location of their road.<sup>3</sup> In order to amount to fraud sufficient to exonerate the subscriber from liability, *there must have been not only misrepresentations of matters of fact, knowingly or recklessly made, and without belief that the statement was true, but it must also have been intended for the subscriber to act upon, and the subscriber must have acted in reliance upon it, — “dolus dans locus contractus.”*<sup>4</sup>

If fraud is established, no action can be maintained by the corporation to recover either upon the original subscription or upon a note given therefor.<sup>5</sup> But the fraud must be shown by some specific conduct on the part of the directors or agents of the corporation *which gave rise to the contract*.<sup>6</sup> It has been held in Illinois that stock subscribed for must be paid, notwithstanding the giving

<sup>1</sup> Vicksburgh, &c. R. R. Co. v. McKean, 12 La. An. 638; Martin v. Pensacola & Georgia R. R. Co., 8 Fla. 370. Compare Cunningham v. Edgefield, 2 Head (Tenn.), 23.

<sup>2</sup> Goodrich v. Reynolds, 31 Ill. 490; Penobscot R. R. Co. v. White, 41 Me. 512; Fort Wayne, &c. Turnpike Co., 10 Ind. 563.

<sup>3</sup> North Carolina R. R. Co. v. Leach, 4 Jones (N. C.), L. 340.

<sup>4</sup> Taylor v. Ashton, 11 M. & W. 415; Thom v. Bigland, 8 Exchq. 725; Attwood v. Small, 2 Cl. & F. 282; Kennedy v. Panama Royal Mail Co., L. R. 2 Q. B. 580.

<sup>5</sup> Occidental Ins. Co. v. Gauzhorn, 2 Mo. App. 205. In this case it was held that no action can be maintained, as between original parties, on a note given for a subscription to a proposed corporation

set on foot in violation of law; or where the maker, acting in good faith, was led to give the note by false and fraudulent misstatements, with which the company is chargeable; as where the maker of such a note showed that the articles of association of an insurance company recited that the whole stock was already taken by the original corporators; that part of the alleged subscriptions of stock were fictitious, and exhibited for the purpose of inducing *bond fide* subscriptions; that no affidavit was appended to the articles, as required by law; that, when the license was issued, the percentage required by law had not in fact been paid in, and that the stock note sued on was given by defendants in ignorance of these facts, and upon the faith of representations to the contrary.

<sup>6</sup> LORD BROUGHAM in Burns v. Pennell, 2 H. L. Cas. 497.



of a note therefor was induced by the misrepresentations of the agents of the company as to the amount of stock then subscribed and the time within which the road would be completed.<sup>1</sup> And where a secret agreement was entered into between the directors of a railroad company and a subscriber, that he might within a specified time reduce the number of shares subscribed for, the subscription being made to appear *bond fide* for the purpose of inducing others to subscribe, — in an action by the corporation for such subscription, it was held that the full amount might be recovered, as the stipulation to reduce the amount was a fraud on the other subscribers.<sup>2</sup> But the general rule is that subscriptions obtained by fraud cannot be enforced against the subscribers, and that although the rule of evidence is that parol representations cannot be permitted to vary the terms of a written agreement, still this rule will not exclude parol evidence to show such fraud as would be allowed to

<sup>1</sup> Goodrich v. Reynolds, 31 Ill. 490; Johnson v. Crawfordsville, &c. R. R. Co., 11 Ind. 280; Andrews v. Ohio, &c. R. R. Co., 14 id. 169; Hardy v. Merriweather, id. 203; Thornburgh v. Newcastle, &c. R. R. Co., id. 499; Dynes v. Shaffer, 19 id. 165. But see Wert v. Crawfordsville, &c. R. R. Co., id. 242; Litchfield Bank v. Church, 29 Conn. 137; Southern Plank Road Co. v. Hixon, 5 Ind. 166.

<sup>2</sup> White Mt. R. R. Co. v. Eastman, 34 N. H. 124. See also Downie v. White, 12 Wis. 176; Crawford v. Pittsburgh, &c. R. R. Co., 32 Penn. St. 141; Robinson v. Same, id. 334. When a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a *bond fide* subscriber by which he has sustained or might sustain injury, no action can be maintained against him by the corporation for the amount of his subscription, unless such subscriber has accepted the charter and by his own acts has assisted in putting it in operation; in that case he cannot avail himself of the fact that part of the stock was fictitious. And if a stock company lets off a part of its subscribers and returns them their money, other subscribers, not consenting thereto, are discharged from all liability growing out of their original subscription. If a person is induced to subscribe for stock by means of

representations which are not fulfilled, it has been held that he is not bound to take the stock. See, relating to the effect of fictitious stock, Center T. Co. v. McConahy, 16 S. & R. (Penn.) 140; Thorpe v. Hughes, 3 My. & Cr. 742; Crump v. U. S. Mining Co., 7 Gratt. (Va.) 352; Southern P. R. R. Co. v. Hixon, 5 Ind. 166. But when a subscriber discovers such frauds he must renounce all benefits derived from his subscription, or he will be responsible. Deposit Asso. Co. v. Ayscough, 6 E. & B. 761. See also County of Crawford v. Pittsburgh R. R. Co., 32 Penn. St. 141; Pittsburgh, &c. R. R. Co. v. Graham, 36 id. 77; Same v. Stewart, 41 id. 44; Connecticut R. R. Co. v. Baxter, 32 Vt. 805; Central R. R. Co. v. Kisch, L. R. 2 H. L. 99; Smith's Case, L. R. 2 Ch. 604; Heyman v. European Ry. Co., L. R. 4 Eq. 154. If the prospectus contains a material misrepresentation or misstatement of facts, the subscription induced thereby may be rescinded. Smith v. Reese Riv. Co., L. R. 2 Eq. 264; Ross v. Estates Investment Co., L. R. 3 Eq. 122; L. R. 3 Ch. 682; Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29. But the misrepresentation must be in reference to a material matter. Lenton v. McNeil, L. R. Eq. 352; Hallows v. Fernie, L. R. 3 Ch. 467; Jackson v. Turquand, L. R. 4 H. L. 305.

vitiating any other contract.<sup>1</sup> In order to relieve himself from liability upon his subscription, not only must actual fraud be shown, but it must also appear that the subscriber acted upon the false statements of the agents of the corporation in respect to matters of fact material to the value of the enterprise, and not upon the mere speculation of the directors, or upon his own exaggerated ideas of the prospective success and value of the business.<sup>2</sup>

<sup>1</sup> See *Blodgett v. Morrill*, 20 Vt. 509; Conn., &c. R. R. Co. v. Bailey, 24 id. 465; Conn., &c. R. R. Co. v. Baxter, 32 id. 805; *Burrows v. Smith*, 10 N. Y. 550; *New York Exchange Co. v. DeWolf*, 31 id. 273; s. c. 5 Bosw. 593; *Coil v. Pittsburgh Female Coll.*, 40 Penn. St. 439; *Kennebec R. R. Co. v. Waters*, 34 Me. 369; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Martin v. Pensacola Coal Co.*, 8 Fla. 370; *Rives v. Plank Road Co.*, 30 Ala. 92; *Smith v. Plank Road Co.*, id. 650; *Hester v. Memphis R. R. Co.*, 32 Miss. 378; *Walker v. Mobile R. R. Co.*, 34 id. 245; *Ellison v. same*, 36 id. 572; *Henderson v. R. R. Co.*, 17 Tex. 560; *La Grange R. R. Co. v. Mays*, 29 Mo. 64. The general rule of evidence is that parol statements and representations, or agreements made at the time of the execution of a written contract, and inconsistent with the written terms of the same, are inadmissible and void, unless fraud is shown. *Thornburgh v. Newcastle R. R. Co.*, 14 Ind. 499; *Johnson v. Crawfordsville R. R. Co.*, 11 id. 280; *Hardy v. Merriwether*, 14 id. 203; *Kennebec R. R. Co. v. Waters*, 34 Me. 369; *Wight v. Shelby R. R. Co.*, 16 B. Mon. (Ky.) 4; *New York Exch. Co. v. De Wolf*, 5 Bosw. (N. Y.) 593; *Mississippi R. R. Co. v. Cross*, 29 Ark. 443; *Smith v. Plank Road Co.*, 30 Ala. 650. Oral evidence is inadmissible to vary the terms of a subscription to the stock of a corporation, unless it tends to show fraud or mistake. But where the subscriber is really misled, and induced to subscribe for stock upon the representation of a state of facts, in regard to essential matters, made by those who take up the subscription, and in good faith and upon proper inquiry and the exercise of reasonable discretion believed by the subscriber, and which constitutes the prevailing motive and consideration for the

subscription, and which proves false, — it would seem that the contract of subscription should be held void, both in law and equity. *Wight v. Shelby R. R. Co.*, 16 B. Mon. (Ky.) 5; *Blodgett v. Morrill*, 20 Vt. 509; *Kennebec & Port R. R. Co. v. Waters*, 34 Me. 369; *Henderson v. Railway Co.*, 17 Tex. 560. But if the location of a railroad is different from that provided in the charter, it has been held that the subscriber may lose his right to object thereto and to paying his subscription on that ground, unless he resorts to *mandamus* or injunction at the earliest convenient time. *Booker, ex parte*, 18 Ark. 338; *Brownlee v. Ohio, Ind. & Ill. R. R. Co.*, 18 Ind. 68.

<sup>2</sup> *Jennings v. Broughton*, 22 L. J. (N. S.) Ch. 585. A false statement by an agent of the company soliciting stock subscriptions, that the company already had enough subscriptions to finish the road in a specified time, and sought others from persons living on the line of the road only as evidence of friendliness, was held to bear merely on matters of expectation and opinion, and not to suffice to void the subscription. *Bish v. Bradford*, 17 Ind. 490; *Brownlee v. Ohio, &c. R. R. Co.*, 18 id. 68; *Parker v. Thomas*, 19 id. 213; *Hardy v. Merriwether*, 14 id. 203. The defendant, sued on his subscription for stock in a turnpike company, answered that he was illiterate and could not read, and did not hear the articles of association read; but a party to them, interested in obtaining subscriptions, induced him to subscribe by his false representation that the articles did not require a payment of subscription until \$20,000 had been subscribed. It was held that these averments set up a sufficient ground of defence. *Wert v. Crawfordsville, &c. Co.*, 19 Ind. 242. But parol declarations made by officers of a

The rule that parol evidence cannot be admitted to alter or deny the terms of a written contract has no application where it is merely sought to establish substantial fraud inducing the party to enter into the contract.<sup>1</sup> But in no case can a party be permitted to prove that certain fraudulent representations or agreements were made *which are inconsistent with the terms of the subscription*;<sup>2</sup> nor the

company on public occasions, if admissible at all to invalidate a subscription for stock, cannot avail a subscriber who does not show that such declarations *amounted to fraud on the part of the company, inducing error on his own part when he subscribed*. Vicksburgh R. R. Co. v. McKean, 12 La. An. 638. Representations as to the value of the land given to the company by the United States, and as to the probable cost and profit of the road, and the means of the company, are but the opinions of the agent, which the subscriber has no right to rely on,—the falsity of which is no ground for avoiding the contract. Walker v. Mobile, &c. R. R. Co., 34 Miss. 245. And in the same case it was held that a colorable subscription by a person of influence, shown to the defendant to induce him to subscribe, does not avoid his subscription, *unless, relying on it, he was thereby induced to subscribe*. Fraudulent representations by an officer of a corporation at a public meeting, in presence of a majority of the directors, not in pursuance of any authority from their board, will not discharge a subscriber to stock. Buffalo, &c. R. R. Co. v. Dudley, 14 N. Y. 336. While a fraudulent representation by an agent to obtain subscriptions to the stock of a company avoids the subscription, an unperformed promise to obtain for the subscriber stock in another company, or an honest mistake as to the probable expense of the improvement, will not. Crossman v. Penrose Ferry Bridge Co., 26 Penn. St. 69. When an agent of a corporation, for the purpose of selling its stock, made certain representations of the company and its prospects, which subscribers said were false and fraudulent, and were beyond what was stated in the prospectus and reports of the company, it was held, in an action by the company against a subscriber to recover his subscription, that evidence of the fraudulent and false rep-

resentations of the agent were admissible on the part of the defendant, and that it was a question of fact for the jury whether or not the subscriber, from all the circumstances in the case, was deceived by the agent; and where a corporation issued a prospectus and reports of its condition for the purpose of selling its stock, it was held that if there were any false statements contained in such proposals, *as to material facts, which misled purchasers to their injury, and in which the purchasers trusted to the agents of the corporation*, the contract of sale was void, whether the corporation did this knowingly or not. The same rule was applied to the concealment of material facts. Crump v. U. S. Mining Co., 7 Gratt. (Va.) 352. A corporation is liable for false and fraudulent *material representations* made by its agents who are engaged in soliciting stock subscription, that the company is in good condition and repute, earning on the completed portion of its road four and one-half per cent on the entire cost of the road, etc., when it was a fact known to these agents that the road was on the verge of bankruptcy, without credit, and its stock and bonds of little value, were held sufficient ground for the rescission of subscriptions made on the strength of such representations. Waldo v. Chicago, &c. R. R. Co., 14 Wis. 575.

<sup>1</sup> New Orleans, &c. R. R. Co. v. Williams, 16 La. An. 315; Crump v. United States Mining Co., 7 Gratt. (Va.) 352; Henderson v. R. R. Co., 17 Tex. 560; Rives v. Plank Road Co., 30 Ala. 92; Wert v. Crawfordville, &c. Co., 19 Ind. 242.

<sup>2</sup> Blodgett v. Morrill, 20 Vt. 509; Conn. & P. R. R. Co. v. Bailey, 24 id. 465; Johnson v. Crawfordville R. R. Co., 11 Ind. 280; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Smith v. Plank Road Co., 30 Ala. 650.

effect of the agreement, or what it contains;<sup>1</sup> as a party is bound to know the contents of an instrument which he signs, and its effect, and has no right to rely upon the representations or judgment of the other party in that regard; and if parol evidence were admissible to override an agreement upon this ground, greater mischiefs would result than could possibly ensue from holding a party up to strict liability where he has been misled as to the effect of his contract by relying upon the statement or judgment of the other party.

In order to relieve a party from liability on the ground of fraud, misrepresentations as to facts which are not mere matters of judgment or opinion must be shown; and it is not competent to show that the officers of the company or the persons procuring the subscriptions represented that the company would do certain things which it has not done and did not intend to do,<sup>2</sup> or made false representations as to the future prospects and value of the enterprise,<sup>3</sup> or the probable expenses of the company.<sup>4</sup> Nor can a subscriber for stock be relieved from the payment on the ground of a fraud to which he was a party,<sup>5</sup> nor if he has been guilty of *laches* in asserting the fraud.<sup>6</sup>

The defence of fraud will not be allowed in equity, when the subscriber's relief on that ground would operate injuriously to other innocent subscribers, who are presumed to have subscribed in reliance upon other subscriptions, or where it would injuriously affect the creditors of the corporation; because, in such cases, to release the subscribers would be inequitable and unjust as to such innocent subscribers and creditors.<sup>7</sup>

**SEC. 47. Assignment, Effect of.**—The fact that a subscriber has assigned and transferred his interest in the shares of a corporation, does not release him from liability for calls, *unless the corporation has assented thereto, and the transfer has been made upon the books of*

<sup>1</sup> *Thornburgh v. Newcastle, &c. R. R. Co.*, 14 Ind. 499.

<sup>2</sup> *Martin v. Pensacola, &c., R. R. Co.*, 8 Fla., 370; *Vicksburgh, &c. R. R. Co. v. McKean*, 12 La. An. 638; *Carlisle v. Evansville, &c. R. R. Co.*, 13 Ind. 477; *Mississippi, &c. R. R. Co. v. Cross*, 20 Ark. 443.

<sup>3</sup> *Vawter v. Ohio, &c. R. R. Co.*, 14 Ind. 174; *Salem Mill Dam Corporation v. Ropes*, 9 Pick. (Mass.) 187.

<sup>4</sup> *Walker v. Mobile, &c. R. R. Co.*, 34

Miss. 245; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380.

<sup>5</sup> *Graff v. Pittsburgh, &c. R. R. Co.*, 31 Penn. St. 489; *Southern Plank Road Co. v. Hixon*, 5 Ind. 165; *Litchfield Bank v. Church*, 29 Conn. 137.

<sup>6</sup> *Dynes v. Shaffer*, 19 Ind. 165.

<sup>7</sup> *Schaeffer v. Home Ins. Co.*, 46 Mo. 248; *Chubb v. Upton*, 95 U. S. 665; *Graff v. Pittsburgh, &c. R. R. Co.*, 31 Penn. St. 489; *Miller v. Hanover Junction R. R. Co.*, 87 Penn. St. 95.

*the company*;<sup>1</sup> and a transfer regularly made does not relieve him from liability for a call made *before* the transfer.<sup>2</sup> If a regular transfer has been made upon the books, liability for calls afterwards made attaches to the transferee, although a new certificate has not been issued to him.<sup>3</sup> As soon as the transfer has been effectuated by an entry upon the books of the company, as required by the statute or the by-laws of the corporation, the transferee becomes a

<sup>1</sup> *Everhart v. West Chester, &c. R. R. Co.*, 23 Penn. St. 339; *Merrimac Mining Co. v. Levy*, 54 Penn. St. 227; *Graff v. Pittsburgh, &c. R. R. Co.*, 31 id. 489; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Turnbull v. Payson*, 16 Bankr. Reg. (U. S.) 440; *Corden v. Universal Gas Co.*, 16 M. & W. 804; *Sayles v. Blane*, 14 Jur. 87; *Aylesbury Railway Co. v. Mount*, 2 Dowl. 143; *Ryder v. Alton, &c. R. R. Co.*, 13 Ill. 516. It is simply necessary, in order to fix the liability of an assignee of stock, that he has become a stockholder. *Merrimac Mining Co. v. Bagley*, 14 Mich. 501. There is no rule or principle of law which can establish any difference among stockholders in the duties which are implied from that relation. The very essence of a corporation consists in its corporate succession, which is kept up by the substitution of one owner for another in the proprietorship of shares. If the original stockholders stand under different relations to the company from their assigns, the corporation itself loses some of its attributes by the substitution, or else becomes introduced into more complicated relations. Every liability, therefore, which attaches to a stockholder as such, is inseparable from the ownership of the stock. *Merrimac Mining Co. v. Bagley, ante*. Where the owner of shares transferred them upon the books of the company, after calls were made, *but before they fell due*, it was held that the transferee was liable for such calls, although he had never received certificates, or given notice to the transferor of the acceptance of the transfer. And it was held to make no difference, that the transfer was from an original subscriber, without consideration, and that the holder is nevertheless liable for unpaid calls. *West Philadelphia Canal Co. v. Innes*, 3 Whart. (Penn.)

198; *Hartford & New Haven R. R. Co. v. Boorman*, 12 Conn. 530; *Aylesbury R. R. v. Mount*, 2 Dowl. N. S. 143. An assignee of shares which are subject to the payment of future calls, is not personally liable for such unpaid instalments, in the absence of any provision in the act of incorporation to this effect. *Palmer v. Ridge Mining Co.*, 34 Penn. St. 288. But a person for whose benefit shares of stock are made over, as security, *without their being transferred into his name on the books of the company*, is not liable to an action for arrears of calls upon such shares. *Newry, &c. Railway Co. v. Moss*, 14 Beav. 64. And the defendant in an action for calls may, under a traverse of his being a shareholder, prove that he was not such either *de jure* or *de facto*. *Shropshire Union Railways & Canal Company v. Anderson*, 6 Dowl. & L. 482.

<sup>2</sup> *West Philadelphia Canal Co. v. Innes*, 3 Whart. (Penn.) 198; *Mann v. Pentz*, 2 Sandf. Ch. (N. Y.) 258; *Hartford, &c. R. R. Co. v. Boorman*, 12 Conn. 530; *Aylesbury Railway Co. v. Mount*, 2 Dowl. N. S. 143; *Seymour v. Sturgis*, 26 N. Y. 134; *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36; *Heritage's Case*, L. R. 9 Eq. 5; *Curtis's Case*, L. R. 6 Eq. 455; *Webster v. Upton*, 91 U. S. 328; *Wheelock v. Kost*, 77 Ill. 296; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437; *Hall v. United States Ins. Co.*, 5 Gill (Md.), 484; *Brigam v. Mead*, 10 Allen (Mass.), 245; *Adderley v. Storms*, 6 Hill (N. Y.), 624. *In re Empire City Bank*, 18 N. Y. 190; *Isham v. Buckingham*, 49 N. Y. 216; *Gaff v. Fleisher*, 33 Ohio St. 107; *Everhart v. Philadelphia, &c. R. R. Co.*, 23 Penn. St. 339; *Ryder v. Alton, &c. R. R. Co.*, 13 Ill. 516; *Graff v. Pittsburgh, &c. R. R. Co.*, 31 Penn. St. 489.

<sup>3</sup> *Chouteau Spring Co. v. Harris, ante*.

stockholder, and subject to all the burdens and benefits imposed by the position.<sup>1</sup> But in order that a stockholder may be released from liability, the purchaser of the stock must be some one who succeeds to a liability distinct from and in addition to that of the corporation; and an assignment to the corporation does not have that effect.<sup>2</sup> So too it must be *bond fide*, and not made for the mere purpose of evading liability, or of defeating creditors.<sup>3</sup> The unpaid subscriptions are treated as a trust fund for the payment of the debts of the corporation, and if the directors release subscriptions or make any arrangements with the subscribers which are in fraud of the rights of the creditors, the latter may reach them in equity; and doubtless if a responsible subscriber were permitted to assign his interest to a person whom he and the directors knew to be irresponsible, the liability of the subscriber in favor of the creditors of the corporation would be enforced.<sup>4</sup> A *bond fide* assignee of stock which is issued as fully paid up, cannot be made liable to creditors of the corporation for unpaid instalments thereon, if it turns out that the stock is not in fact fully paid up.<sup>5</sup> The remedy of a creditor or of any

<sup>1</sup> Merrimac Mining Co. v. Bagley, 14 Mich. 501; Mann v. Currie, 2 Barb. (N. Y.) 294; Hall v. United States Ins. Co., 5 Gill (Md.), 484. Until a transfer is duly entered, the person in whose name the stock stands upon the books is presumed to be the owner thereof. Midland Great Western Railway v. Gordon, 16 Wald. 804.

<sup>2</sup> In re Reciprocity Bank, 22 N. Y. 18; Alford v. Miller, 32 Conn. 543; Currier v. Lebanon Slate Co., 56 N. H. 262.

<sup>3</sup> Bawdon v. Santas, 1 Hughes (U. S. C. C.), 158; Veiller v. Brown, 18 Hun (N. Y.), 571; Nathan v. Whitlock, 9 Paige Ch. (N. Y.) 152.

<sup>4</sup> Nathan v. Whitlock, *ante*; Sawyer v. Hoag, 17 Wall. (U. S.) 610; Osgood v. King, 42 Iowa, 478; Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 466; Curran v. Arkansas, 15 How. (U. S.) 304; Dalton, &c. R. R. Co. v. McDaniel, 56 Ga. 191; Ogilvie v. Knox Ins. Co., 22 How. (U. S.) 380; Melvin v. Lamar Ins. Co., 80 Ill. 446; Bassett v. St. Albans Hotel Co., 47 Vt. 313; McMasters v. Davidson, 29 Hun (N. Y.), 542; Germantown, &c. R. R. Co. v. Fidler, 60 Penn. St. 124; Hastings v. Drew, 76 N. Y. 9; Robertson v. Sibley,

10 Minn. 323; Bartlett v. Drew, 57 N. Y. 587; Bacon v. Robertson, 18 How. (U. S.) 480; Hardy v. Merriwether, 14 Ind. 203; Marsh v. Burroughs, 1 Woods (U. S. C. C.), 463; In re Wincham, &c. Co., L. R. 9 Ch. Div. 329; Westchester, &c. R. R. Co. v. Thomas, 2 Phil. (Penn.) 344; Hatch v. Dana, 101 U. S. 205. But the creditors of a corporation organized under the general law cannot, *at law*, enforce the liability of a stockholder upon an unpaid subscription. Patterson v. Lynde, 106 U. S. 519. But they can do so in equity. Crawford v. Rohner, 59 Md. 599.

<sup>5</sup> Brant v. Ehlen, 59 Md. 1. Where stock has been in good faith settled for by a stockholder, under a *bond fide* arrangement with the corporation, it is not in all cases, and as a matter of right, in the power of a creditor to disturb this arrangement upon the ground that in the light of subsequent developments it proved a disadvantageous one; and especially is this the case where the creditor knew of the arrangement at the time, and acquiesced in it. Coit v. North Carolina Gold Amalgamating Co., 14 Fed. Rep. (U. S. C. C.) 12. But no agreement which amounts only to a nominal payment for

representative of a creditor, is by a bill in equity against the subscribers, either one or more;<sup>1</sup> and it is no defence that by statute such subscriptions are only payable in such instalments as the trustees may deem proper.<sup>2</sup>

SEC. 48. **Assessments, How must be made — Notice of, &c.** — A corporation does not, at common law, possess the power to make an assessment upon the stockholders, and compel its payment by action; but such power, if it exists at all, is conferred by the charter or by general or special statute,<sup>3</sup> or arises from the contract itself. An assessment can be made only in the manner provided by the statute,<sup>4</sup> and for the purposes therein named. Indeed all the conditions which the statute imposes must first be complied with, and the corporation must be in a position to enforce the call by action; that is, it must be organized. Thus, where the number of shares is fixed by the charter, a valid assessment for general purposes cannot be made against a subscriber until the whole number of shares are taken, unless the statute otherwise provides or the shareholders have in some manner waived the provisions of the statute in this respect,<sup>5</sup> although the subscription is in fact completed before action is brought to recover the assessment.<sup>6</sup> If the charter requires that notice shall be given in certain news-

the stock, whether in money or property, will be regarded as a valid payment against creditors. *Crawford v. Rohner*, 59 Md. 599. See also *Kehlor v. Lademann*, 11 Mo. App. 550, where it was held that where stock issued for a sum less than its par value, the holder will be liable to a creditor for the difference. See also *s. r. Skrainka v. Allen*, 76 Mo. 384.

<sup>1</sup> *Hatch v. Dana*, *ante*; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593. In these cases an accounting as to other indebtedness of the corporation was held unnecessary; but in *Chandler v. Keith*, 42 Iowa, 99, it was held that a call, or something equivalent thereto, under the direction of the court, based on the indebtedness of the corporation, should precede a suit in favor of creditors. See also *Chandler v. Siddle*, 3 Dill. (U. S. C. C.) 477. Innocent purchasers of stock in open market have been held not to be liable for any portion of the unpaid subscriptions to creditors; but the remedy remains against the guilty parties. *Foreman v. Bigelow*, 7 Rep. 137 (U. S. C. C.).

<sup>2</sup> *Crawford v. Rohner*, 59 Md. 599.

<sup>3</sup> *Atlantic De Laine Co. v. Mason*, 5 R. I. 463; *Franklin Glass Co. v. Alexander*, 2 N. H. 380.

<sup>4</sup> *Ex parte Winsor*, 3 Story (U. S. C. C.), 411; *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451; *Portland R. R. Co. v. Kendall*, 31 Me. 476.

<sup>5</sup> *Central R. R. Co. v. Johnson*, 31 N. H. 390; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Peoria, &c. Co. v. Preston*, 35 Iowa, 115. That a stockholder who has participated or acquiesced in the action of a corporation or of corporate officers in laying an assessment, by voting for a by-law directing it, or making payments upon it with knowledge of the facts, is estopped from setting up want of authority in the corporation, seems to be well established (*Macon, &c. R. R. Co. v. Vason*, 57 Ga. 314; *Ossipee Mfg. Co. v. Canney*, 54 N. H. 295; *Willamette Freighting Co. v. Stannus*, 4 Oregon, 261; *Kansas City Hotel v. Harris*, 51 Mo. 464), although some of the early cases seem to have held otherwise.

<sup>6</sup> *Stratford, &c. Railway Co. v. Stratton*, 2 B. & Ad. 518.

papers for a certain number of days before calls are made,<sup>1</sup> such notice must be given or no valid assessment can be laid; and personal notice is not sufficient.<sup>2</sup> But in Arkansas<sup>3</sup> it is held that personal notice for the requisite time is sufficient, and that the provision as to publication is merely directory; and in Massachusetts a similar doctrine was held as to the requirements of a by-law relating to notice.<sup>4</sup> In that case a by-law of a railroad corporation provided that, in case of a sale of shares for non-payment of assessments, "the treasurer should give notice to the delinquent owner, when his residence was known, of the time and place of sale, by letter seasonably put into the mail." And it was held that this by-law was directory to the treasurer, and not a condition precedent; and that a written notice of the time and place of sale, signed by the treasurer, and delivered to the owner of the shares, or left at his dwelling-house, and received by him as soon as he was entitled to receive it by mail, was sufficient. But in this case it may be questionable whether the notice given was not strictly in compliance with the statute. Thus, the charter of a railroad corporation authorized the directors to make such equal assessments from time to time on all the shares in the corporation as they might deem expedient and necessary in the execution and progress of the work; provided "that no assessments shall be laid upon any share in said corporation of a greater amount than \$100 in the whole on such share; and if a greater amount of money shall be necessary to complete said road, it shall be raised by creating new shares." It was held that the charter limited the amount of all the assessments to \$100 on a share, and that assessments beyond that sum, made by the directors for the payment of the debts of the corporation, were illegal.<sup>5</sup>

So a clause in the charter of a corporation, "that the shares in said capital stock shall not be liable to assessment after the capital stock so fixed in amount has been paid in, except in equal proportions, and by the consent of the stockholders owning at least three-fourths of the shares of the capital stock of the corporation," does not authorize a further assessment of paid stock, except upon the basis that the capital stock, fixed in amount by the charter, has

<sup>1</sup> *Macon, &c. R. R. Co. v. Vason*, 57 Ga. 314; *Mississippi, &c. R. R. Co. v. Gastner*, 20 Ark. 455.

<sup>2</sup> *Id. Tonilin v. Tonica, &c. R. R. Co.*, 23 Ill. 429.

<sup>3</sup> *Mississippi, &c. R. R. Co. v. Gastner*.

<sup>4</sup> *Lexington, &c. R. R. Co. v. Chandler*, 13 Met. (Mass.) 311.

<sup>5</sup> *Great Falls, &c. R. R. v. Copp*, 38 N. H. 124; *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451.



been subscribed for and actually paid in ;<sup>1</sup> and generally, as before stated, it is indispensable to the validity of a call, that — unless the charter otherwise provides — the full number of shares should be subscribed for ;<sup>2</sup> and the corporation cannot by its acts, votes, or declarations, relieve itself from its obligation to have the capital required by its charter. Should it vote to waive all objections to the deficiency and proceed to make assessments, it would be illegal and void ; and assessments made before the necessary amount is subscribed are not binding, and are not made so by waiver or estoppel. In case after the subscription, but before the number of shares subscribed equals that required, an amendment to their charter is procured by which the required number of shares is reduced, a previous subscriber is not liable to pay an assessment on his shares, at least until the sum originally fixed is subscribed.<sup>3</sup>

Where the charter of a railroad corporation contained a provision that the capital stock should consist of not less than a certain number of shares, it was held that all assessments laid by the company before the required number of shares had been subscribed were invalid, and an action for the amount of such assessments could not be maintained. And a subscription-paper for shares in a railroad corporation which provides that assessments may be laid “when three thousand shares shall have been subscribed,” does not authorize the laying of an assessment until the stipulated amount has been unconditionally subscribed, payable in cash. Thus this provision does not include a subscription, by a contractor for building a railroad, of a certain number of shares, “being a portion of” a sum which, by his contract, was to be paid to him in stock at par, or, in case of any stock being issued by the corporation below par, then at the rate of the lowest issue.

The same principle applies to a subscription to the stock of a railroad company authorized by its charter to connect at the State line with any railroad that may be constructed from a place in another State, or to take a lease of any such contiguous railroad, — made upon

<sup>1</sup> *Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

<sup>2</sup> *Atlantic Cotton Mills v. Abbott*, 9 Cush. (Mass.), 423 ; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172 ; *Stoneham Branch R. R. Co. v. Gould*, 2 Gray (Mass.), 277 ; *Lexington, &c. R. R. Co. v. Chandler*, 13 Met. (Mass.) 311 ; *Worcester, &c. R. R. Co. v. Hinds*, 8 Cush. (Mass.) 110 ; *Peake*

*v. Wabash R. R. Co.*, 18 Ill. 88 ; *Contoocook Valley R. R. Co. v. Barker*, 32 N. H. 362 ; *Penobscot, &c. R. R. Co. v. Dunn*, 39 Me. 587 ; *Oldtown, &c. R. R. Co. v. Veazie*, 39 id. 571 ; *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124 ; *Great Falls, &c. R. R. Co. v. Copp*, 38 N. H. 124. <sup>3</sup> *Oldtown, &c. R. R. Co. v. Veazie*, 39 Me. (4 Heath) 571.

condition that "no assessment shall be laid until that part of the railroad between the end of the line in another State and a certain place in this commonwealth shall be put under contract."<sup>1</sup>

<sup>1</sup> *Troy, &c. R. R. Co. v. Newton*, 8 Gray (Mass.), 596. A person may by his acts be estopped from denying his liability as stockholder. Thus, when a defendant is sued as a stockholder in a railroad corporation for the sum remaining due on an assessment upon his shares, after they have been sold for non-payment of the assessment, it is competent and sufficient, for the purpose of showing him to be such stockholder, and liable for the assessment, to give evidence that he signed a subscription-paper for shares, before the corporation was organized, that he attended the meeting of the stockholders for the organization of the corporation, and that he wrote and distributed votes, and himself voted for directors. *Lexington & West Cambridge R. R. Co. v. Chandler*, 13 Met. (Mass.) 311. In an action to recover unpaid assessments upon shares of the stock of a railroad company, an agreement between the defendant and a third person, by which the latter agreed to subscribe for stock in said company, and the former guaranteed to him dividends, equal to six per cent per annum, on the stock subscribed for by him in pursuance thereof, was held to be admissible in evidence for the purpose of showing that the defendant procured others to subscribe to the stock of said company, and the inducements which he held out for that purpose. *Danbury & Norwalk R. R. Co. v. Wilson*, 22 Conn. 435. Where a commissioner appointed to receive subscriptions subscribed for shares in his own name, and then united with other commissioners in making a return, which stated that the subscriptions were in all respects made and taken in good faith and agreeably to the provisions and requirements of the laws of the State, and that he had subscribed for twenty shares, and on the strength of this return the charter was granted,—it was held that, in an action for assessments upon the subscription, he was estopped from showing that it was made upon a condition which had not been complied with. *Bavington v. Pitts-*

*burgh, &c. R. R. Co.*, 34 Penn. St. 358; *N. H. Central R. R. Co. v. Johnson*, 30 N. H. 390. In an action for calls, it was found, upon a special verdict, that, before they were made, the defendant was registered as a shareholder, and that he knew he was registered, and that he adopted the registry, and acted as a shareholder; and it was held that, upon such finding, the defendant was presumptively liable for calls. *West Cornwall Railway Co. v. Mowatt*, 15 Q. B. 521. So payment of instalments on a subscription to its stock, is a sufficient recognition of the legal existence and organization of a corporation by the subscriber so paying, to enable it to recover the remaining instalments from him. *Maltby v. Northwestern, &c. R. R. Co.*, 16 Md. 422. So where one has paid calls on shares, or attended meetings of the company, as the proprietor of shares, he is estopped to deny membership. *London Grand Junction Railway Co. v. Graham*, 1 Q. B. 271; *Cromford & Highpeak Railway Co. v. Lacey*, 3 You. & J. 80. But it has been held that a stockholder, *also a director*, is not estopped from disputing, as a stockholder, his liability for a call, by the fact that *as a director* he voted for imposing it; nor by the fact that he has made a part payment upon it. *Stratford & Moreton Railway Co. v. Stratton*, 2 B. & Ad. 519. Nor is a subscriber who has paid an illegal assessment thereby estopped from setting up illegality as a defence to a suit for a second. *Somerset, &c. R. R. Co. v. Cushing*, 45 Me. 524. A buyer of shares who has made false representations to the company, to induce them to enter his name upon the register of shares, is estopped to deny the validity of the transfer so obtained, in an action against him for calls. *Sheffield, &c. Railway Co. v. Woodcock*, 7 M. & W. 574; *London Grand Junction Railway Co. v. Freeman*, 2 Eng. Railw. Cas. 468. So where the party represented himself to the company as the owner of shares, and sent in scrip certificates, which had been purchased by him, claiming to be regis-

In another case, by a contract of subscription for stock in a railroad company, it was stipulated that two per cent should be paid at the time of subscription, and three per cent in three months from that date, and the remainder when called for and required by the president and directors; and the first two instalments were not to be called for until March 1, 1853. It was held that the first two instalments were payable on March 1, 1853, and the latter was payable thereafter, at the discretion of the company, according to the terms of the contract; but that the corporation had no right to call for the payment of such instalments until it became requisite to pay contractors for the construction of the road at the point stated.<sup>1</sup>

When the charter does not fix the number of shares, it is presumed that the legislature intended that the number should be fixed either by the stockholders or directors; and it is an indispensable requisite that the number should be so fixed, before an assessment can be made.<sup>2</sup> But when the charter of the company requires that the capital stock be not less than 500 nor more than 10,000 shares, of \$100 each, and authorizes the directors to assess upon 500 shares as soon as subscribed, and from time to time to enlarge the capital to the maximum amount named in the charter, all the shares to be equally assessed, — it is not necessary for the company to define their capital, within the prescribed limits, before making calls.<sup>3</sup>

The power to enforce calls exists only in the company to whose stock the subscription was made, unless there has been a sale of the franchises of the company to another, or a consolidation with another company in pursuance of full statutory authority;<sup>4</sup> and in that event

tered as a proprietor in respect thereof, and had received from the company receipts therefor, with a notice that they would be exchanged for sealed certificates on demand, he was held estopped to deny his liability for calls, although his name had not been entered upon the register of shareholders, or any memorial of transfer entered, as required by the act. *Cheltenham, &c. Railway Co. v. Daniel*, 2 Q. B. 281; *Cheltenham, &c. Railway Co. v. De Medina*, 2 Eng. Railw. Cas. 735.

<sup>1</sup> *Roberts v. Mobile, &c. R. R. Co.*, 32 Miss. 373. Where the act of incorporation contemplates some act to be done, — *e. g.* organization, — before instalments of stock can be required to be paid, such act must be done before the corporation can maintain an action for the instalments,

the subscription being made prior to the time of organization. *Carlisle v. Cahawba & Marion R. R. Co.*, 4 Ala. 70.

<sup>2</sup> *Somerset, &c. R. R. Co. v. Cushing*, 45 Me. 524; *Cabot, &c. Bridge v. Chapin*, 6 Cush. (Mass.) 50; *Worcester, &c. R. R. Co. v. Hinds*, 8 id. 110; *Troy, &c. R. R. Co. v. Newton*, 8 Gray (Mass.), 596.

<sup>3</sup> *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124. See also *York, &c. R. R. Co. v. Pratt*, 40 Me. 447.

<sup>4</sup> *Thrasher v. Pike County R. R. Co.*, 25 Ill. 393. A corporation authorized to hold real and personal estate, each to a limited amount, may lawfully make assessments on its members to an amount exceeding the personal estate it was authorized to hold. *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547. If the

the question whether the subscription can be recovered in the name of the transferee or not, is one which must depend entirely upon the provisions of the charter or general law. Unless there is an over-subscription of stock, which has not been equalized, it is not essential that certificates of stock should have been issued to the subscribers, or that there should have been any formal acceptance of the subscription. Indeed, a call for an assessment, made upon a subscriber, is sufficient to establish both acceptance and membership.<sup>1</sup> If the corporation is unauthorized or illegal, all its acts are a nullity, and a call cannot be enforced by it.<sup>2</sup> But it cannot be objected to a call that the directors who made it were illegally elected; as,

charter provides that no assessment beyond \$100 per share shall be laid, any further assessment is void. *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451. And when the sum designated in a charter, to be raised by assessment, has been raised, the power to assess is exhausted. *State v. Morristown Fire Association*, 23 N. J. L. 195. A statute authority "to make and collect such assessments on the shares" as may be deemed expedient, in such manner as should be prescribed in their by-laws, does not confer on the corporation the power to create a personal liability on the stockholder to pay for his shares. And a by-law, made under such authority, and providing that "if the shares of any delinquent stockholder shall not sell for a sum sufficient to pay his assessments, with interest and charges of sale, he shall be held liable for any such deficiency," will not sustain an action at law for the deficiency. *Kennebec & Portland R. R. Co. v. Kendall*, 31 Me. 470. The assent of an individual stockholder to an assessment is not necessary to charge him. *Smith v. Natchez Steamboat Co.*, 2 Miss. 479. Generally, a corporation formed pursuant to articles of association of an unincorporated company, can exercise a power of assessment conferred by those articles upon the incorporated body to whose property and franchises it succeeds. See *Hull v. Wellesley*, 6 H. & N. 38; *Wallingford Mfg. Co. v. Fox*, 12 Vt. 304; *Goddard v. Pratt*, 16 Pick. (Mass.) 412. A provision in a statute or charter, authorizing the corporation, at a legal meeting called for the purpose, to make

assessments upon shares, vests the power in the corporation, as distinguished from the board of directors; and the corporation cannot delegate such power to the directors, in the absence of any special authority to do so. A by-law authorizing the directors to take care of the interests, and manage the concerns, of the corporation, must, upon the principles of fair reasoning, be limited to the ordinary interests, and ordinary concerns, of the corporation, as general agents of the corporation, and not extend to the extraordinary interests, or extraordinary concerns, expressly confided to the discretion of the corporation itself, by the very terms of the charter, — *e. g.*, the power to lay assessments on shareholders. *Ex parte Winsor*, 3 Story (U. S. C. C.), 411. The power to make calls is generally lodged with the directors, being deemed included in their general authority to manage the concerns of the company. *Ambergate, &c. Railway Co. v. Mitchell*, 4 Exch. 540. And it is no sufficient ground of enjoining the directors from making calls, that the proceedings of the directors had been improper, and such as to amount to an abandonment of the enterprise; as it was possible that there were still legal obligations to answer. *Logan v. Courtown*, 5 Eng. L. & Eq. 171.

<sup>1</sup> *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 439; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Wight v. Shelby R. R. Co.*, 16 B. Mon. (Ky.) 4; *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 336.

<sup>2</sup> *Gillespie v. Fort Wayne, &c. R. R. Co.*, 17 Ind. 243.

being in office under color of an election, they are at least *de facto* officers, and their acts are obligatory upon the corporation.<sup>1</sup> Unless, however, there is some saving clause in the charter or general law, after a sale of the franchises and property of a corporation upon a mortgage, an action to recover conditional subscriptions will not lie.<sup>2</sup> Thus in the case last cited, C. and others signed an instrument as follows: "We, citizens of U., pledge ourselves to subscribe for and take stock in and for the construction of the L. railroad, to the amount set opposite our names respectively, on condition said road be located and built through or north of U." It was held, that the L. company could not maintain an action thereon against C.; as it was no subscription to the company's capital stock.

**SEC. 49. Power must be Exercised as Statute provides.** — If the power to lay assessments is vested exclusively in the corporation, it cannot be delegated to the directors; but if authority is given to a corporation, by an act of the legislature, to raise a fund in addition to their capital stock by assessment on the stockholders, the corporation may confer the power on the directors to lay assessments for this purpose; but unless the corporation does expressly confer such authority, the directors have no power to lay it.<sup>3</sup> And where the articles of incorporation of a railway company restricted the instalments of stock that might be called for in any one year, by the board of directors, to twenty-five per cent of the whole amount, and also provided for a change in the articles by the votes of the directors, and a change was so made in compliance with the general statutes on that subject, by which the directors were authorized to assess five per cent per month, — it was held that such change was binding upon the stockholders who subscribed previously to such alteration.<sup>4</sup>

If the power to make assessments is by the charter vested in the directors, the stockholders or corporation have no power to make them; and *vice versa*; <sup>5</sup> although, if the statute does not in terms make the exercise of this power by the stockholders indispensable, it

<sup>1</sup> Johnson v. Crawfordsville, &c. R. R. Co., 11 Ind. 280; Eakright v. Logansport, &c. R. R. Co., 13 id. 404.

<sup>2</sup> Lake Shore, &c. R. R. Co. v. Curtiss, 80 N. Y. 219.

<sup>3</sup> Marlborough Mfg. Co. v. Smith, 2 Conn. 579; Middletown, &c. Turnpike Co. v. Watson, 1 Rawle (Penn.), 330.

<sup>4</sup> Burlington, &c. R. R. Co. v. White,

5 Iowa, 409; South Bay, &c. Co. v. Gray, 30 Me. 547. But see, when the charter is amended after subscription, but before completing the organization reducing the number of shares required to be taken before organization, Oldtown, &c. R. R. Co. v. Veazie, 39 Me. 571.

<sup>5</sup> Haun v. Mulberry, &c. Gravel Road Co., 33 Ind. 103.

has been held that they may, by resolution after the organization of the company, delegate the power to the directors.<sup>1</sup> But in all cases, the assessment must be legally made, or it is nugatory; that is, it must be made by persons having the power to make it.<sup>2</sup> If made by the directors, it must be made by a *majority* of them,<sup>3</sup> and conformity with the requirements of the statute, charter, or by-laws should be alleged.<sup>4</sup> So too, the assessment must be equal as to all,<sup>5</sup> and made only for a legal object,<sup>6</sup> and strictly as required by law.

SEC. 50. **Assessments made by Instalments.** — In order to recover subscriptions to stock in a railway company, which is to be called for in proportions, it must appear that the instalments were called for periodically; and not that the assessments therefor were all made at one time, without notice of previous assessments.<sup>7</sup> But if the directors have a general power to make calls, a call is not invalid because it is imposed for a gross sum payable in several instalments. It is not necessary that each instalment should be the subject of a separate call.<sup>8</sup> Where the charter provides that all assessments shall be determined by the directors, and lays down the rules by which the amount to be raised, and the manner in which it is to be apportioned, are fixed, all that is necessary is, that the directors determine by vote that an assessment be laid; and such vote is a sufficient requirement of payment.<sup>9</sup> Calls made by a treasurer under general authority given by the board of directors are valid, although the resolutions do not specify the amount of each call.<sup>10</sup> Where a corporation was limited to fifteen-per-cent calls per annum, and ten per cent had already been called, it was held immaterial that the last call did not specify the amount, time,

<sup>1</sup> *Rives v. Plank Road Co.*, 30 Ala. 92.

<sup>2</sup> *Hawbeach's Coal Co. v. League*, 5 H. & N. 151; *Kirk v. Bell*, 16 Q. B. 290.

<sup>3</sup> *Price v. Grand Rapids, &c. R. R. Co.*, 13 Ind. 58; *Hamilton v. Grand Rapids, &c. R. R. Co.*, 13 Ind. 347; *Cowley v. Grand Rapids, &c. R. R. Co.*, 13 Ind. 61; *Silver Hook Road v. Greene*, 12 R. I. 164; *Monmouth, &c. Ins. Co. v. Lowell*, 59 Me. 504; *Pike v. Bangor, &c. R. R. Co.*, 68 Me. 445.

<sup>4</sup> *Atlantic Mutual Fire Ins. Co. v. Young*, 38 N. H. 451; *Mississippi, &c. R. R. Co. v. Gastner*, 20 Ark. 455.

<sup>5</sup> *Preston v. Grand, &c. Dock Co.*, 11

*Sim.* 327; *Gilbert's Case*, L. R. 5 Ch. 559; *Haberdon's Case*, L. R. 5 Eq. 286.

<sup>6</sup> *South Eastern Railway Co. v. Hebblethwaite*, 12 Ad. & El. 497; *Willand Railway Co. v. Blake*, 6 H. & N. 410.

<sup>7</sup> *Spangler v. Indiana, &c. R. R. Co.*, 21 Ill. 276.

<sup>8</sup> *Ambergate R. R. Co. v. Norcliffe*, 20 Law J. N. s. Exch. 234; *Birkenhead, &c. R. R. Co. v. Webster*, 6 Railw. Cas. 498; *Penobscot, &c. R. R. Co. v. Dummer*, 40 Me. 172; *Penobscot, &c. R. R. Co. v. Dunn*, 39 id. 587.

<sup>9</sup> *Atlantic Fire Ins. Co. v. Sanders*, 36 N. H. 252.

<sup>10</sup> *Hays v. Pittsburgh, &c. R. R. Co.*, 38 Penn. St. 81.

or place of payment, the accompanying notice pointing out the time and place.<sup>1</sup> The resolution of the directors to make a call need not specify either the time or place of payment, although the directors must appoint a time and place, which must be notified to the shareholders by a notice allowing them twenty-one days for making payment.<sup>2</sup> A vote of the directors requiring instalments to be paid at the times therein designated, but which does not, in terms, make them payable to the treasurer of the corporation, are nevertheless construed to mean that such instalments are payable to the treasurer, he being the proper officer to receive and keep the moneys of the corporation.<sup>3</sup> By a charter of a bridge corporation, subscribers to stock were required "to pay assessments to the treasurer of the trustees, at such times and in such proportions as the trustees shall direct; and in default of payment, it shall be lawful for the trustees to sue for or recover the same, in the name of their treasurer, by action of debt or on the case," etc. The order of the trustees directed the money to be paid into a certain bank to be placed to the account of P. M. as treasurer; and it was held that the treasurer was sufficiently designated in the order, and that the form of action might be either in debt or on the case.<sup>4</sup>

No other demand for payment of an assessment is necessary than that prescribed by the by-laws of the corporation;<sup>5</sup> and if the charter of the corporation does not require a *written* notice of calls, a verbal notice by the secretary, given by order of the president, in pursuance of a resolution of the board of directors, is sufficient;<sup>6</sup> or by publication in the newspapers where the corporation usually transacts its business. A similar notice may be given by receivers of an insolvent corporation, appointed by the court.<sup>7</sup>

**SEC. 51. When Discretion is vested in Directors.**—When the directors are invested with a discretion as to the time, manner, and amount of assessments, they may lay an assessment for the whole amount due upon the subscription at one time. Thus, under a statute which authorized the directors of a company to require "payment from subscribers to the capital stock of the sums subscribed

<sup>1</sup> Andrews v. Ohio, &c. R. R. Co., 14 Ind. 169.

<sup>2</sup> Newry & Enniskillen Railway Co. v. Edmunds, 5 Eng. Railw. Cas. 275.

<sup>3</sup> Danbury & Norwalk R. R. Co. v. Wilson, 22 Conn. 435.

<sup>4</sup> Miles v. Bough, 3 Q. B. 845.

<sup>5</sup> Penobscot R. R. Co. v. Dummer, 40 Me. 172.

<sup>6</sup> Smith v. Plank Road Co., 30 Ala. n. s. 650.

<sup>7</sup> Hall v. U. S. Ins. Co., 5 Gill (Md.), 484.

by them, at such times and in such proportions and on such conditions as they shall see fit," it was held that the directors were invested with full discretionary power as to the time and manner of payment, and that they might require the whole subscription to be paid at one time or in instalments.<sup>1</sup> But a general resolution of a railroad company forfeiting stock for non-payment of instalments, must declare to the stockholder that they claim to forfeit his specific stock, or it will not be valid.<sup>2</sup> And where the capital stock is to be paid at such times and in such proportions as required by the president and directors, though the shareholders will be liable to third persons for their subscriptions, whether called in or not, yet the call, being an uncertain event, forms a condition which, as between the subscribers and the corporation, suspends the obligation to pay until called in.<sup>3</sup>

**SEC. 52. Corporation books Evidence of exercise of Discretion.** — Where the terms of the subscription required that assessments should not exceed five dollars on each share at any one time, it was held that, if no greater sum was payable at one time, several assessments might be voted at one time, and that the records of the corporation are competent evidence to show who were the corporators, and the number of shares that had been taken at the time of the one assessment, unless some proof is introduced to destroy their effect.<sup>4</sup> So, where an act of incorporation provided that the members might divide the capital stock into as many shares as they might think proper, and by a written agreement they fixed the capital stock at \$50,000, and divided it into 500 shares of \$100 each, but only 138

<sup>1</sup> *Haun v. Mulberry, &c. R. R. Co.*, 33 Ind. 103. In *Penobscot, &c. R. R. Co. v. Dunn*, 39 Me. 587, and *Penobscot, &c. R. R. Co. v. Dummer*, 40 id. 172, where the conditions of the subscription provided that not more than five dollars on a share should be assessed at one time, and the directors laid more than that amount at the same time, but did not require more than five dollars on a share to be paid at one time, it was held that the assessment was binding.

<sup>2</sup> *Johnson v. Albany, &c. R. R. Co.*, 40 How. Pr. (N. Y.) 198.

<sup>3</sup> *Purton v. N. O., &c. R. R. Co.*, 3 La. An. 19.

<sup>4</sup> *Penobscot, &c. R. R. Co. v. Dummer*, 40 Me. 172. *Penobscot, &c. R. R. Co. v.*

*Dunn*, 39 Me. 587. But a contrary doctrine seems to be held in *Spangler v. Indiana, &c. R. R. Co.*, 21 Ill. 276; *Boardman v. Lake Shore, &c. R. R. Co.*, 84 N. Y. 157. The subscription books kept by the commissioners are in the nature of official registers, and are competent evidence to prove how much per mile has been subscribed to the capital stock. *Monroe v. Fort Wayne, &c. R. R. Co.*, 28 Mich. 272. Where the name of a person appears upon the stock book as a stockholder, the presumption is that he is the owner of the stock appearing against his name, and the book is proper evidence to go to the jury to show that fact. *Pittsburgh, &c. R. R. Co. v. Applegate*, 21 W. Va. 172.



shares were taken,—it was held that no assessment for the general purposes of the corporation could be legally made until all the shares were taken.<sup>1</sup> And if the proper officers of an insolvent corporation have neglected to call in unpaid subscriptions due to the company from solvent stockholders, in a proper proceeding in chancery by a judgment creditor of such company against the company and such stockholders, the court may decree payment by such stockholders to such judgment creditor, to the extent of such amounts of subscription as remain unpaid.<sup>2</sup>

SEC. 53. **Notice of Assessments or Calls.**—Notice of the assessment or call is usually provided for by the act, or articles of association, or the by-laws of the corporation, to be given personally or by publication to delinquent subscribers before proceedings can be taken to recover the same by suit at law, or by forfeiture of shares or sums paid on them. The mode and manner of proceeding and the length of notice is generally thus provided for, of which provisions the stockholder is bound to take notice. But, whatever may be the requirement of the charter in this respect, it should be strictly followed in order to entitle the corporation to the remedies provided in case of the neglect or default of the subscriber to attend to the call, and make the payment required; and especially when there is authority in the company to forfeit the shares.<sup>3</sup> But a judgment for an instalment on a subscription was sustained where it did not appear that the defendant had any notice of a call for the same, as it did not appear that the charter required notice to be given.<sup>4</sup>

<sup>1</sup> Littleton Mfg. Co. v. Parker, 14 N. H. 543; Contoocook, &c. R. R. Co. v. Barker, 32 id. 363.

<sup>2</sup> Bassett v. St. Albans, &c. R. R. Co., 47 Vt. 313.

<sup>3</sup> Cornwall G. C. M. Co. v. Bennett, 5 H. & N. 423; s. c. 6 Jur. (N. S.) 539; Anglo-California G. M. Co. v. Lewis, 6 H. & N. 174; s. c. 6 Jur. (N. S.) 1376.

<sup>4</sup> Wilson v. Mills Valley R. R. Co., 33 Ga. 466. If instalments are regularly assessed in accordance with the terms provided in the subscription, no notice of the assessment, or of the time and place of payment of the same, is required. See Lake Ontario R. R. Co. v. Mason, 16 N. Y. 451; Smith v. Indiana, &c. R. R. Co., 12 Ind. 61; Eakright v. Logansport, &c. R. R. Co., 13 id. 404; New Albany R. R. Co. v. McCormick, 10 id. 499; Breedlove

v. Martinsville R. R. Co., 12 id. 114; Eppes v. Mississippi, &c. R. R. Co., 35 Ala. 33; Smith v. Plank Road Co., 30 id. 650. The manner prescribed for giving notice has been, in some cases, considered as directory only; and it has been held that notice may be given in a different manner, if the subscriber can sustain no injury thereby; as, for instance, a personal notice to the subscriber, where one by publication is prescribed. See Lexington R. R. Co. v. Chandler, 13 Met. (Mass.) 311; Mississippi R. R. Co. v. Gastner, 20 Ark. 455. But see Lewey's Island R. R. Co. v. Bolton, 48 Me. 451; Rutland R. R. Co. v. Thrall, 35 Vt. 547. Where the fundamental law prescribes a certain length of notice before suit can be brought, such notice must be given. Id.

**SEC. 54. Sufficiency of.**—The notice, when required, in case of authority to sell by virtue of a power in the company for that purpose, should express the time and place of sale, and should be reasonably sufficient in the absence of provisions as to the length of notice, for the purposes for which it is required or intended. Thus, it was held, in Massachusetts, that a notice that shares in a railroad company would be sold for non-payment of assessments on a day fixed, and by an auctioneer named, who was and long had been an auctioneer in the place at which the notice bore date, was insufficient, as it did not express the place of sale; and three days' notice of the time and place of sale was held to be unreasonably short, and, therefore, insufficient, where the owner resided at a distance.<sup>1</sup>

Where a by-law of a corporation provided for a notice to be given of sales of shares for non-payment of assessments, by advertisement designating the time and place thereof and the shares to be sold, it was held that any description sufficing to show clearly what shares were intended to be the subject of sale, was sufficient;<sup>2</sup> and where a charter provided that for non-payment of assessments "the directors may order the treasurer to sell such shares at auction, . . . and the delinquent subscriber shall be held accountable for the balance, if the shares sell for less than the assessments," and the directors voted that the president and treasurer be a committee to collect arrearages, and enforce such collections by sales or otherwise, it was held that a sale under this vote was void; that the directors could not delegate the power of ordinary sales to a committee; and that the order to the treasurer must be absolute and not in the alternative.<sup>3</sup> And when the charter authorizing a sale of the stock of delinquent subscribers required notice of the assessment to be given thirty days before the order of the directors for the sale of the shares, and that the treasurer should give to the subscriber the notice in hand signed by the treasurer, or by a director on his behalf, it was held that a notice of the assessment thirty days before the sale, or a notice to the subscriber in hand not signed by the treasurer or a director, was insufficient.<sup>4</sup> But, when an act of incorporation requires that the

<sup>1</sup> *Lexington R. R. Co. v. Staples*, 5 Gray (Mass.), 520.

<sup>2</sup> *York, &c. R. R. Co. v. Pratt*, 40 Me. 447.

<sup>3</sup> *York, &c. R. R. Co. v. Ritchie*, 40 Me. 425. The proceedings in making the calls must have been substantially in conformity with the charter and by-laws

of the company and the general laws of the State at the time of making the same. Any subsequent ratification by the directors of an informal call will only give it effect from the date of the ratification.

<sup>4</sup> *Lewey's &c. R. R. Co. v. Bolton*, 48 Me. 451.

place of payments of stock shall be designated in the notice requiring payment, a notice requiring payment to be made to a certain person residing in a certain city is *prima facie* a compliance with the statute.<sup>1</sup> And notice to pay instalments of a subscription to the treasurer of a company implies that it should be made to him at his office, and is a sufficient designation of the place of payment.<sup>2</sup>

SEC. 55. **Payment—How may be made.**—It has been said that, unless the statute so provides, a corporation can take nothing but money in payment for stock;<sup>3</sup> but this must be taken with many important qualifications. The rule is based upon the ground that payment in anything but money would operate to destroy the equality upon which all stockholders should stand; therefore it would seem that *payment in any other mode which preserves this equality is sufficient*; which extends the rule to a payment in money or its equivalent. The rule may be stated to be, that *the stock must be paid for, but not necessarily in money, unless the statute expressly so provides*.<sup>4</sup> Thus, payment by check drawn upon a bank in which the drawer has funds to meet it,<sup>5</sup> or by a promissory note which is paid at maturity, has been held sufficient.<sup>6</sup> So, it has been held that where the charter

<sup>1</sup> Troy, &c. R. R. Co. v. McChesney, 21 Wend. (N. Y.) 296.

<sup>2</sup> Muskingum, &c. Co. v. Ward, 13 Ohio, 120.

<sup>3</sup> Neuse River Navigation Co. v. Newbern, 7 Jones (N. C.) L. 275; Henry v. Vermillion, &c. R. R. Co., 17 Ohio, 187; Knowlton v. Congress & Empire Springs Co., 57 N. Y. 518; Cleland's Case, L. R. 14 Eq. 387.

<sup>4</sup> Edmonds v. Bringier, 27 La. An. 118; Beach v. Smith, 30 N. Y. 116; Pittsburgh, &c. R. R. Co. v. Stewart, 41 Penn. St. 54; McRae v. Russell, 12 Ired. (N. C.) L. 224.

<sup>5</sup> People v. Stockton, &c. R. R. Co., 45 Cal. 306; Wetherbee v. Baker, 35 N. J. Eq. 501.

<sup>6</sup> Blunt v. Walker, 11 Wis. 334; Vermont Central R. R. Co. v. Cloyes, 21 Vt. 30; Clark v. Farrington, 11 Wis. 306; Cornell v. Hichins, 11 id. 353; Waldo v. Chicago, &c. R. R. Co., 14 id. 575; Illinois, &c. R. R. Co. v. Cook, 29 Ill. 327; Carr v. Le Fevre, 27 Penn. St. 413; Lyon v. Ewings, 17 Wis. 61; *In re Mercantile Trading Co.*, L. R. 11 Eq. 131;

Hardy v. Merriweather, 14 Ind. 203; State v. Bailey, 16 Ind. 46; Cincinnati, &c. R. R. Co. v. Clarkson, 7 Ind. 595; Greenville, &c. R. R. Co. v. Woodslides, 5 Rich. (S. C.) 145; Carter v. Lebanon Slate Co., 56 N. H. 262; Selma, &c. R. R. Co. v. Tipton, 5 Ala. 787; Ogdensburgh, &c. R. R. Co. v. Wooley, 1 Keyes (N. Y.), 118; Selma, &c. R. R. Co. v. Rountree, 7 Ala. 670. Not only estoppels, technically so called, but estoppels *in pais* operate both for and against corporations. Thus, where the charter of a corporation requires the payment of five per cent on the amount subscribed at the time of subscription, if the subscriber, instead of making the cash payment, gives his note therefor, participates in the organization of the company, becomes one of the directors, and pays his note, he cannot afterwards insist, as a defence to an action to recover an instalment, that he did not pay the five per cent at subscription. Selma & Tennessee R. R. Co. v. Tipton, 5 Ala. (N. s.) 787; Greenville, &c. R. R. Co. v. Woodslides, 5 Rich. (S. C.) L. 145; Chamberlain v. Painesville & Hudson R. R. Co.,

does not expressly require payment to be made in cash, it may be made in the stock of other corporations,<sup>1</sup> or even in the stock of the same corporation.<sup>2</sup> So it has, with great propriety and reason, been held that a railroad company may compromise subscriptions for stock, which are doubtful, upon receiving part payment; or may receive payment in labor or materials, or in damages which the company is liable to pay, or in any other liability of the corporation.<sup>3</sup>

So, a credit given to a subscriber, upon his subscription, of a sum due him from the corporation, is good as a payment. Thus, under a charter of a corporation which provided that each stockholder should be liable for the company's debts to the amount of the balance unpaid on his stock, it was held that money paid to, and receipted for, by one who conveyed land to the corporation, necessary for its purposes, such payment being credited to the stockholder on the company's books, was a good payment to the corporation *pro tanto* on the stock, and could not be affected by an error in judgment as to the value of such lands.<sup>4</sup>

But in the case last cited a resolution was passed by the directors invalidating such payments, but providing that stockholders unable or neglecting to pay an additional instalment, might return their old certificates and receive new ones to the amount of their actual cash

15 Ohio St. 225. A stock subscriber who has not paid his five per cent at the time of subscribing cannot avail himself of the plea that the charter required it to be paid at the time of subscribing, and in default thereof declare his subscription forfeited, *for it was his duty to make the payment; and to sustain such a defence would be to permit a party to avail himself of his own wrong.* Vicksburgh Railroad v. McKean, 12 La. An. 638.

<sup>1</sup> Swartara R. R. Co. v. Bune, 6 Gill (Md.), 41. In East New York & Jamaica R. R. Co. v. Lighthall, 6 Rob. (N. Y.) 407, it was held that the act of the president of a corporation in receiving payment of a subscription to its stock in the stock of another company, is binding on the corporation where the latter is not restricted by its charter to receiving subscriptions in money only; and in an English case, *In re Mercantile Trading Co.*, L. R. 11 Eq. 131, payment in Confederate bonds was held sufficient.

<sup>2</sup> Currier v. Lebanon Slate Co., 56

N. H. 282. But in this case it was held that payment could not be so made, because the statute forbids such payment. But see City Bank of Columbus v. Bruce, 17 N. Y. 307, where it was held that a corporation, in the absence of a statutory prohibition, may purchase its own stock and reissue it.

<sup>3</sup> Philadelphia & West Chester R. R. Co. v. Hickman, 28 Pa. St. 318. But see Henry v. Vermillion, &c. R. R. Co., 17 Ohio, 187.

<sup>4</sup> Carr v. Le Fevre, 27 Pa. St. 413; Philadelphia, &c. R. R. Co. v. Hickman, 28 Penn. St. 318; Tasker v. Wallace, 6 Daly (N. Y. C. P.), 364. In Bross v. Cairo, &c. R. R. Co., 9 Ill. App. 363, in an action upon a note given in aid of the construction of a railway, it was held that damages arising from the construction of the road across the defendant's land in violation of an agreement might be recovered, although the agreement was by parol.

payments; and it was held that such resolution was binding upon no stockholder, unless he voluntarily consented thereto. The presence of a stockholder as director when the resolutions were passed, can only authorize the inference that he assented to them as a whole; and if so, he had a right to avail himself of the provisions for those unable or unwilling to pay.

Payments in labor, lands or materials, at a fair and reasonable valuation, have been held sufficient where they were necessary for, or entered into, the construction of the road.<sup>1</sup> But, as stated in all cases where property is taken in payment in lieu of money, it must be at a fair and reasonable price;<sup>2</sup> and evidence of the real value of the property at the time of its purchase is admissible for the purpose of impeaching the transaction on the ground of fraud.<sup>3</sup> Where, as is sometimes the case, the charter expressly permits subscriptions to be taken payable in property, it is, of course, upon the implied condition that the valuation of the property is fair and reasonable; and, as in the case of a note payable in specific articles, if it is not paid by delivery of the property when due, the subscription becomes payable in money.<sup>4</sup> If the subscriber has the option of paying in money or materials, an opportunity to elect which he will do must be given him before an action will lie against him for the money.<sup>5</sup>

**SEC. 56. Agreement with Subscribers for Stock at less than par value, Invalid when.**—The stock subscribed in the capital of a corporation is a trust fund for the payment of its debts; therefore the creditors of a corporation have a right to insist that it shall be paid for in full, and an agreement between a stockholder and the officers

<sup>1</sup> *In re Limestone Works Co.*, L. R. 17 Eq. 169; *Cincinnati, &c. R. R. Co. v. Clarkson*, 7 Ind. 595; *Osgood v. King*, 42 Iowa, 478; *Goodin v. Evans*, 18 Ohio St. 150; *Junction R. R. Co. v. Reeves*, 15 Ind. 236; *Ridgefield, &c. R. R. Co. v. Brush*, 43 Conn. 86; *Philadelphia, &c. R. R. Co. v. Hickman*, 28 Penn. St. 318; *Boody v. Rutland, &c. R. R. Co.*, 24 Vt. 660; *Ohio, &c. R. R. Co. v. Cramer*, 23 Ind. 490; *Eppes v. Mississippi, &c. R. R. Co.*, 35 Ala. 33; *State v. Bailey*, 16 Ind. 46; *Spargo's Case*, L. R. 8 Ch. 407; *Louisville, &c. R. R. Co. v. Thompson*, 18 B. Mon. (Ky.) 735; *Pittsburgh, &c. R. R. Co. v. Stewart*, 41 Penn. St. 54; *In re Baglan Hall Colliery Co.*, L. R. 5 Ch. 346; *Phillips v. Covington, &c. Bridge Co.*, 2 Met. (Ky.) 219.

<sup>2</sup> *Boynton v. Hatch*, 47 N. Y. 225; *Schenck v. Andrews*, 57 N. Y. 133; s. c. 46 id. 589; *Osgood v. King*, 42 Iowa, 478.

<sup>3</sup> *Boynton v. Hatch*, *ante*; *Schenck v. Andrews*, *ante*. The fact of its subsequent depreciation will not, in the absence of fraud, affect the validity of the transaction. *Protection Life Ins. Co. v. Osgood*, 93 Ill. 69.

<sup>4</sup> *Hayworth v. Junction R. R. Co.*, 13 Ind. 348; *Haywood, &c. Plank Road Co. v. Bryan*, 6 Jones (N. C.), 82. Such payments cannot be enforced by instalments. *Ohio, &c. R. R. Co. v. Cramer*, 23 Ind. 490.

<sup>5</sup> *Eppes v. Mississippi, &c. R. R. Co.*, 35 Ala. 33.

of the corporation, that he shall not be required to pay for the stock in full, is not binding as against the creditors, even though full-paid-up stock is issued to the subscriber.<sup>1</sup> But before an action can be brought by an assignee in bankruptcy to recover at law for the amount unpaid, it was held, in the case last cited, that a bill in equity to set aside the agreement must first be brought. The remedy of creditors to reach this trust fund is in a court of equity, where the subscriptions to the stock, as before stated, are regarded as a trust fund to be held by the corporation for the benefit of creditors, from the payment of the full amount of which the directors have no power to release a subscriber, to the prejudice of such creditors or of other stockholders;<sup>2</sup> and the fact that a stockholder was induced to take the stock by the false representations of the president or directors of the corporation that it was full-paid capital stock, is no defence to an action by a creditor of the corporation to recover the difference between the amount paid and the par value of the stock.<sup>3</sup> But where stock is sold by a corporation at less than its par value, *as between the purchaser and the corporation* the sale is valid, unless prohibited by statute.<sup>4</sup>

SEC. 57. **Paid-up Shares.** — Where stock is fully paid for, either in money, or by property at a fair and reasonable valuation, or by the offset of a debt due from the corporation, no fraud being practised, the subscriber is released from all further assessments, unless the statute authorizes assessments to be made for special purposes.<sup>5</sup> But if the stock has not been fully paid up, any agreement on the part

<sup>1</sup> *Scovill v. Thayer*, 105 U. S. 143.

<sup>2</sup> *Rider v. Morrison*, 54 Md. 429; *Wetherbee v. Baker*, 35 N. J. Eq. 501. The officers of a corporation cannot properly sell the stock for less than the par value. To enable a stockholder to recover from a corporation for the depreciation of his stock by mismanagement, he must show that the injury was peculiar to himself alone, as apart from the other stockholders; and an instruction to a jury to this effect is correct. In Green's Brice's "Ultra Vires," 143, note, it is said: "The sale of stock in a corporation by the directors at a less rate than the price fixed in the charter is a fraud upon the law and the stockholders," — citing *Sturges v. Stetson*, 1 Biss. (U. S. C. C.) 246; *Fosdick v. Sturges*, id. 255; *Mann v. Cooke*, 20 Conn. 188; *Fisk v. Chicago, R. I. & P. R.*

*Co.*, 53 Barb. (N. Y.) 513; *O'Brien v. Same*, id. 568; *Neuse River Nav. Co. v. Com'rs*, 7 Jones (N. C.) L. 275. See also *Osgood v. King*, 42 Iowa, 478; *Oliphant v. Woodbury Coal & Mining Co.*, Iowa (S. C.), 1884, not yet reported.

<sup>3</sup> *Briggs v. Cornwall*, 9 Daly (N. Y. C. P.), 436.

<sup>4</sup> *Harrison v. Arkansas Valley R. R. Co.*, 4 McCrary (U. S. C. C.), 264. See n. 2, *supra*.

<sup>5</sup> *Ohio, &c. R. R. Co. v. Cramer*, 23 Ind. 490; *Beach v. Smith*, 30 N. Y. 116; *American Silk Works v. Salomon*, 4 Hun (N. Y.), 135; *Cincinnati R. R. Co. v. Clarkson*, 7 Ind. 595; *Santa Cruz, &c. R. R. Co. v. Spreckles*, 9 Am. & Eng. R. R. Cas. 679; *Spense v. Iowa, &c. Construction Co.*, 36 Iowa, 407.

of the company that it shall be so treated, and not liable for calls, is void, because not within the power of the corporation to make.<sup>1</sup> But in England it is held that shares issued and registered as paid up, under an improper or delusive contract which has actually been registered, are to be treated as paid up in the hands of *bond fide* transferees,<sup>2</sup> the liability remaining upon the transferors.<sup>3</sup> The question in all cases whether stock is fully paid up, is one of fact for the jury. When stock is put upon the market by a corporation, after its work is completed, by virtue of a power given to it in its charter or by general law, as fully paid up, and sold for the highest price obtainable in the market, a different question is presented, both in law and in equity, from that which arises where the stock is originally subscribed for, and therefore has its origin under a contract to which all future purchasers are privy; and the liability of stockholders in the two cases is quite different.

**SEC. 58. Right of the Consolidated Company to make Calls.**—Where a right to consolidate with another corporation is expressly given in the charter or general law, there seems to be no doubt that they may, even after an agreement to consolidate is entered into, continue in the full enjoyment of their powers and franchises respectively, and may accept subscriptions to their capital stock at any time before the consolidation is actually consummated by filing the agreement of consolidation in the proper office.<sup>4</sup> And where such companies consolidate, the new corporation thereby created may perform the conditions named in subscriptions to the capital stock of the original companies; and it may also, by performance of the conditions, accept a continuing conditional offer to subscribe for such stock,<sup>5</sup> and enforce subscriptions previously made to the stock of either company. But in a suit by a consolidated company to recover assessments upon a subscription to the stock of one of the original corporations, on the ground of a right by succession under the statute, it is essential to a recovery that a consolidation conforming to the statute be proved.<sup>6</sup> And a subscriber, in an action

<sup>1</sup> *Ex parte* Clark, L. R. 7 Eq. 550; Bunn's Case, 2 De G. F. & J. 275.

<sup>2</sup> Bash's Case, L. R. 9 Ch. 554.

<sup>3</sup> Spango's Case, L. R. 8 Ch. 407; Waterhouse v. Jamieson, L. R. 2 Sc. App. 29.

<sup>4</sup> Mansfield, Coldwater, & Lake Michigan R. R. Co. v. Brown, 26 Ohio St. 223,

<sup>5</sup> Mansfield, Coldwater, & Lake Michigan R. R. Co. v. Stout, 26 Ohio St. 241.

<sup>6</sup> Mansfield, Coldwater, & Lake Michigan R. R. Co. v. Drinker, 30 Mich. 124. See also Detroit, Lansing, & Lake Michigan R. R. Co. v. Starnes, 38 Mich. 698.

against him to enforce the collection of assessments by a new corporation formed by consolidation with another company, may question the validity of the consolidation proceedings wherein he took no part, and is not precluded by the fact that such proceedings were sufficient to make the new company a corporation *de facto*; and no change in the corporation, violating any of the substantial statutory conditions, can bind a dissenting stockholder.<sup>1</sup>

But, where two companies formed in different States are consolidated, the objection is not open to a stockholder of the corporation in one of the States, when sued upon his subscription by the consolidated company, that it is not alleged or proved that the statutory amount per mile had been subscribed for the entire road, as well in the other State as in his own, where it clearly appears that the requirement in that respect has been fully complied with by the corporation in his own State.<sup>2</sup>

SEC. 59. **Remedy against Subscribers.** — A corporation may enforce payment of subscriptions to its stock either by an action upon the contract of subscription, or by a sale of the shares, after the subscriber has been put in default by neglecting or refusing to pay the calls made thereon; or it may resort to both remedies, as the provision relating to the forfeiture of the stock is generally held to be merely cumulative, and the subscriber still remains liable upon his express promise.<sup>3</sup> But in some of the States, as in Massachu-

<sup>1</sup> Tuttle v. Michigan Air Line R. R. Co., 35 Mich. 247; 15 Amer. Railw. Rep. 406; Mansfield, Coldwater, & Lake Michigan R. R. Co. v. Drinker, 30 Mich. 124.

<sup>2</sup> Munroe v. Fort Wayne, &c. R. R. Co., 28 Mich. 272.

<sup>3</sup> Hartford, &c. R. R. Co. v. Kennedy, 12 Conn. 499; Hughes v. Antietam Mfg. Co., 34 Md. 316; Northern R. R. Co. v. Miller, 10 Barb. (N. Y.) 260; Selma, &c. R. R. Co. v. Tipton, 5 Ala. 787; Troy Turnpike, &c. Co. v. McChesney, 21 Wend. (N. Y.) 296; Kirksey v. Florida, &c. Plank Road Co., 7 Fla. 23; Western R. R. Co. v. Avery, 64 N. C. 491; Tar River Nav'n Co. v. Neal, 3 Hawks (N. C.), 520; Troy, &c. R. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Instone v. Frankfort Bridge Co., 2 Bibb (Ky.), 576; Canal Co. v. Sampson, 1 Binn. (Penn.) 70; Fort Edward, &c. Plank Road Co. v. Payne, 17 Barb. (N. Y.) 567; Klein v.

Alton, &c. R. R. Co., 18 Ill. 514; Allen v. Montgomery, &c. R. R. Co., 11 Ala. 437; Freeman v. Winchester, 10 S. & M. (Miss.) 577; Beene v. Cahawba, &c. R. R. Co., 3 Ala. 660; Stokes v. Lebanon Turnpike Co., 6 Humph. (Tenn.) 241; Rutland, &c. R. R. Co. v. Thrall, 35 Vt. 536; Herkimer Mfg. Co. v. Small, 21 Wend. (N. Y.) 273; White Mountain R. R. Co. v. Eastman, 34 N. H. 124; N. E. R. R. Co. v. Rodrigues, 10 Rich. (S. C.) 278; Ogdensburgh, &c. R. R. Co. v. Frost, 21 Barb. (N. Y.) 541; Worcester T. Co. v. Willard, 5 Mass. 86; Vt. Central R. R. Co. v. Cloyes, 21 Vt. 30; Kennebec, &c. R. R. Co. v. Palmer, 34 Me. 336; York, &c. R. R. Co. v. Jarvis, 34 id. 360; York, &c. R. R. Co. v. Pratt, 40 id. 447; Greenville, &c. R. R. Co. v. Cathcart, 4 Rich. (S. C.) 89; Stokes v. Lebanon, &c. T. Co., 6 Humph. (Tenn.) 241; Klein v. Alton, &c. R. R. Co., 13 Ill. 514; Contoo-



setts,<sup>1</sup> Maine,<sup>2</sup> New Hampshire,<sup>3</sup> and Vermont,<sup>4</sup> it is held that if there is an *express* promise to pay assessments, the remedy by forfeiture is merely cumulative but where there is no express promise, that the only remedy is by forfeiture of the stock. But this doctrine is generally rejected in the other States, and, as previously stated, the remedy by forfeiture given by the statute is regarded as merely cumulative.<sup>5</sup> But in *all* the States, if the statute expressly makes the remedies alternative, the subscriber is held to be personally liable.<sup>6</sup> But *both* remedies cannot be pursued. If the stock is forfeited and sold by the company, the company has no remedy for the balance if it sells for less than the subscription, nor upon the other hand is the subscriber entitled to the surplus if it sells for more than the subscription,<sup>7</sup> unless the statute expressly gives both remedies.<sup>8</sup> Where both remedies exist, the remedy upon the contract of subscription may be brought before the stock is forfeited;<sup>9</sup> but where the statute gives a remedy for the balance of the subscription, the stock must first be duly forfeited and sold.<sup>10</sup> The stockholder

cook Valley R. R. Co. v. Barker, 32 N. H. 363; N. H. Central R. R. Co. v. Johnson, 30 id. 390; Piscataqua Ferry Co. v. Jones, 39 id. 491; Kennebec, &c. R. R. Co. v. Kendall, 31 Me. 470; South Meadow Dam Co. v. Gray, 30 id. 547; Taunton, &c. T. Co. v. Whiting, 10 Mass. 384; City Hotel, &c. v. Dickinson, 6 Gray (Mass.), 586; Boston, Barre, & Gardner R. R. Co. v. Wellington, 113 Mass. 79; Goshen T. Co. v. Hurlin, 9 Johns. (N. Y.) 217; Middlesex T. Co. v. Locke, 8 Mass. 268; New Bedford, &c. T. Co. v. Adams, 8 id. 138.

<sup>1</sup> Katama Land Co. v. Jonegan, 126 Mass. 155; Mechanics' Foundry, &c. Co. v. Hall, 121 id. 272; Franklin Glass Co. v. White, 14 Mass. 486; Andover, &c. T. Co. v. Gould, 6 id. 40; Ripley v. Sampson, 10 Pick. (Mass.) 371; Cutter v. Middlesex Factory Co., 14 id. 48.

<sup>2</sup> Belfast, &c. R. R. Co. v. Cottrell, 66 Me. 185; Jay Bridge Co. v. Woodman, 31 id. 573; Belfast, &c. R. R. Co. v. Moore, 60 id. 561.

<sup>3</sup> Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Franklin Glass Co. v. Alexander, 2 id. 386; N. H. Central R. R. Co. v. Johnson, 30 id. 390.

<sup>4</sup> Conn. & Passumpsic River R. R. Co. v. Bailey, 24 Vt. 465.

<sup>5</sup> Mann v. Cooke, 20 Conn. 178; Danbury, &c. R. R. Co. v. Wilson, 22 Conn. 435; Hartford, &c. R. R. Co. v. Kennedy, 12 id. 499; Busey v. Hooper, 35 Md. 15; Beene v. Cahawba, &c. R. R. Co., 3 Ala. 660; Peoria, &c. R. R. Co. v. Elting, 17 Ill. 429; Gill v. Kentucky Gold, &c. Mining Co., 7 Bush (Ky.), 635; Kirksey v. Florida, &c. R. R. Co., 7 Fla. 23; Seymour v. Sturgess, 26 N. Y. 134; Dayton v. Borat, 31 id. 435; Phenix, &c. Co. v. Badger, 67 id. 294; Mann v. Currie, 2 Barb. (N. Y.) 294.

<sup>6</sup> Fry v. Lexington, &c. R. R. Co., 2 Met. (Ky.) 214; Kennebec, &c. R. R. Co. v. Kendall, 31 Me. 470.

<sup>7</sup> Small v. Herkimer Mfg. Co., 2 N. Y. 330; Ashton v. Burbank, 2 Dill. (U. S. C. C.) 435; Allen v. Montgomery, &c. R. R. Co., 11 Ala. 437; Rutland, &c. R. R. Co. v. Thrall, 35 Vt. 536; Macon, &c. R. R. Co. v. Vason, 57 Ga. 314.

<sup>8</sup> N. H. Central R. R. Co. v. Johnson, ante; Danbury, &c. R. R. Co. v. Wilson, 22 Conn. 435; Agricultural Branch R. R. Co. v. Winchester, 13 Allen (Mass.), 29.

<sup>9</sup> Boston, &c. R. R. Co. v. Wellington, 113 Mass. 79.

<sup>10</sup> Athol, &c. R. R. Co. v. Prescott, 110 Mass. 213.

may prevent a forfeiture by a tender of the amount due upon the stock, at any time before its sale.<sup>1</sup> After forfeiture, a subscriber ceases to be a stockholder, and loses all his rights, and is released from all his liabilities as such.<sup>2</sup>

<sup>1</sup> *Mitchell v. Vt. Copper Mining Co.*, 67 N. Y. 280.

<sup>2</sup> *Mills v. Stewart*, 41 Vt. 384.

## CHAPTER III.

## STOCKHOLDERS.

## SEC. 60. Who are.

- 61. Right to Vote.
- 62. Proxies.
- 63. Status of a Stockholder, as to Corporate Property, &c. — Rights as against the Corporation and its Officers.
- 64. When Stockholders may defend a Suit against a Corporation.
- 65. Cannot bring Action at Law against Directors for Damages.
- 66. Right to Dividends.
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## SEC. 68. Effect of declaring Dividends: to whom Payable.

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- 72. Stock Dividends.
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- 74. Money in hands of Directors.
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- 76. Infants as Stockholders.

SEC. 60. **Who are.**—A person may become a stockholder in a corporation either by a subscription to the stock or by an assignment of stock to him, either by the act of a stockholder or by act and operation of law. In law, every person whose name appears upon the stock-book of a corporation as a stockholder, is *prima facie* entitled to all the rights and privileges of a stockholder, although he has in fact parted with all his interest in the stock; and this circumstance is, so far as the corporation itself is concerned, absolute proof of his being a stockholder.<sup>1</sup> It would impose a great hardship upon a corporation, to compel it to look beyond its stock-book to ascertain who *in fact* are the owners of the stock, and the law imposes no such burden upon them. The fact that a person's name is upon the registry of stockholders, as a subscriber to the stock, is not of itself sufficient to make him a shareholder, but it must also appear either that it was placed there by himself, or under sufficient authority from him.<sup>2</sup> Thus, in the case first cited in the last note,<sup>3</sup> a company incorporated under the Joint Stock Companies Act, 1856, issued a prospectus at the foot of which was a printed form of application for shares. By the prospectus it was requested

<sup>1</sup> Gilbert v. Manchester Iron Works, 11 Wend. (N. Y.) 629; Vansands v. Middlesex Co. Bank, 26 Conn. 144.

<sup>2</sup> New Brunswick, &c. Railway Co. v.

Muggeridge, 4 H. & N. 160; Waterford Railway Co. v. Pidock, 8 Exchq. 279.

<sup>3</sup> New Brunswick, &c. Railway Co. v.

Muggeridge, 4 H. & N. 160.

that each applicant, in filling up the form, would state for which class of shares he applied, and that all applications be accompanied by a remittance of £2 per share deposit on the number of shares applied for, and should a less number be allotted, the amount paid in excess would be returned. The defendant paid into the bank of the company £600, and filled up and sent to the directors the printed form at the foot of the prospectus as follows: "Gentlemen,— Having paid into the hands of the bankers of the company £600, I request you will allot me 100 shares of Class A, 200 shares of Class B. And *I hereby agree to accept such shares, or any less number, that may be allotted to me, and to pay the future calls thereon.*" The directors allotted to the defendant 50 shares of Class A. and 200 of Class B, and returned him £100, the balance of his deposit. A printed copy of the memorandum and articles of association, at the foot of which was a form of memorandum consenting to be a shareholder, was sent to the defendant; but it was not *signed* by him. The defendant had notice that the share certificates and interest warrants were ready, and he requested that they might be forwarded to him. His name was placed on the register of shareholders for the shares allotted to him. In an action for calls, it was held that the defendant was not a shareholder in the company. But where a person signs a printed memorandum of association or articles of association, before the original is signed or registered as provided by statute, it is held to be a sufficient authority for placing his name on the registry of shareholders.<sup>1</sup>

The possession of a certificate of stock is not necessary to make a person a stockholder. It is enough if his name appears upon the books of the corporation as such, and the certificate is only an inferior species of evidence of his being a stockholder.<sup>2</sup> Consequently it is held that a valid gift of stock cannot be made by a delivery of the certificate, unless it is also accompanied with a proper assignment and power of attorney to transfer it upon the books of the

<sup>1</sup> New Brunswick Railway Co. v. Boone, 3 H. & N. 249. And the registry book, although informally kept, is *prima facie* evidence that a person whose name appears thereon is a stockholder. Birmingham Railway Co. v. Locke, 2 Eng. R. R. & Canal Cas. 867; West Cornwall Railway Co. v. Mowatt, 15 Ad. & El. n. s. 521. And if a person's name has once been placed upon the register as a

stockholder, the company cannot strike it off upon the ground of a flaw in his legal title. Ward v. South Eastern Railway Co., 2 E. & E. 813.

<sup>2</sup> Burrall v. Bushwick R. R. Co., 75 N. Y. 211; Schaeffer v. Missouri Ins. Co., 46 Mo. 248; Haynes v. Brown, 36 N. H. 545; Chester Glass Co. v. Dewey, 16 Mass. 94; Chaffin v. Cummings, 37 Me. 76; Burr v. Wilcox, 22 N. Y. 521.

corporation; until that is done, the donor does not part with his entire dominion over the property, which is an essential and indispensable element of a valid gift.<sup>1</sup> Thus, in the case last cited, S., on buying and paying for thirty shares of railway stock, directed the treasurer to set it aside in Y.'s name, saying he, S., would at some future time let him know whether to deliver it to Y. The treasurer issued a receipt stating he had received the price from Y. At S.'s request Y. gave an order directing the company to transfer three shares as S. might direct. No certificate was ever issued. By direction of S. the dividends were paid to Y. In an action by Y.'s executor to compel the company to issue to him a certificate of the stock, it did not appear how Y. came into possession of the receipt; and it was held that there was no valid gift of the stock.

So far as the corporation is concerned, it has a right to regard a person whose name appears upon its stock-books as the holder of certain stock therein as the true owner thereof, and to treat and deal with him as such, unless it has actual or constructive notice to the contrary. Thus, in a New York case,<sup>2</sup> A. assigned to B. a stock certificate, containing a statement that stock was transferable only upon the books of the corporation; B. failed to obtain such transfer; A. died: it was held that the corporation, having paid dividends to A.'s administrator, could not be held liable to B. for the amount, no presentation of a certificate being necessary upon a demand for dividends by the owner of record of the stock or his personal representative.

But this rule can only be applied in cases where the stockholder is not required to produce his certificate as evidence of his right; and there are instances in which it would be gross negligence for the corporation to dispense with the production of the certificate, and would render it liable to the real owner thereof, for all damages resulting from such act. Thus, if it should transfer the stock upon its books, at the direction of the stockholder of record, without the production and surrender of the old certificate, such act would be not only negligent, but wholly unauthorized; and the corporation would be liable to the true owner for the value of the stock.<sup>3</sup> The reason is, that a corporation is bound, in its capacity of trustee for

<sup>1</sup> Jackson v. Twenty-Third St. R. R. Co., 88 N. Y. 520.

<sup>2</sup> Brisbane v. Delaware, Lackawanna, &c. R. R. Co., 25 Hun (N. Y.), 438.

<sup>3</sup> Brisbane v. Delaware, Lackawanna, &c. R. R. Co., *ante*; Bank v. Lanier, 11 Wall. (U. S.) 369.

stockholders, to protect owners of shares from unauthorized transfers; and is liable in damages for any loss sustained through the negligence or misconduct of its transfer officers in the execution of their duties.<sup>1</sup>

Thus, a corporation which permits a transfer of its own stock by an executor as such, on its books, is chargeable with notice of the will under which he acts, and the contents thereof; and is liable to a *cestui que trust* under the will, whose stock is, by means of a transfer permitted without due examination of the will, converted by the executor to his own use.<sup>2</sup>

SEC. 61. **Right to Vote.**—The person in whose name stock stands upon the books of a corporation, is, as to the corporation, a stockholder, although he has assigned his stock to a third person with a power of attorney to transfer it upon its books, and as such, is *prima facie* entitled to vote at any stockholders' meeting;<sup>3</sup> and this is the case although he has been put into bankruptcy and an assignee in bankruptcy has been appointed, in whom the property of the bankrupt vests, and who under the bankrupt law is entitled to require of the bankrupt the execution of any necessary transfers to vest the title to the stock in him;<sup>4</sup> and, while in proceedings of *quo warranto* the court may go beyond the books, and inquire as to the actual right of such person to vote,<sup>5</sup> yet, if it is shown that the person who appeared as a stockholder upon the books *voted with the assent of the assignee of the stock*, the courts will not interfere.<sup>6</sup> Thus, in the case last cited, stock in a corporation stood upon the books of the corporation in the name of a firm at the time of the annual election of such corporation, but prior to such election the members of the firm had become bankrupts, and an assignee in bankruptcy had been appointed, but the assignee before the election had not demanded or

<sup>1</sup> Bank v. Lanier, 11 Wall. (U. S.) 369; Lowry v. Commercial, &c. Bank, Taney (U. S. C. C.), 310.

<sup>2</sup> Lowry v. Commercial, &c. Bank, Taney (U. S. C. C.), 310; Magwood v. Railroad Bank, 5 S. C. 379; Brewster v. Sime, 42 Cal. 139.

<sup>3</sup> Gilbert v. Manchester Iron Works, 11 Wend. (N. Y.) 629; *Ex parte* Willcocks, 7 Cow. (N. Y.) 402; Vowell v. Thompson, 3 Cr. (U. S. C. C.) 428; Northrup v. Turnpike Co., 3 Conn. 544; Vansands v. Middlesex Co. Bank, 26 Conn. 144; Matter of Barker, 6 Wend. (N. Y.)

509; Hoppin v. Buffum, 9 R. I. 518; Matter of Long Island R. R. Co., 19 Wend. (N. Y.) 37; Marlborough Mfg. Co. v. Smith, 2 Conn. 533; Downing v. Pott, 23 N. J. L. 66; Mosseaux v. Urquhart, 19 La. An. 482. It is not necessary that the certificate of stock should be produced; the stock books control. Beckett v. Houston, 32 Ind. 393.

<sup>4</sup> State v. Ferris, 42 Conn. 560.

<sup>5</sup> American Railway Frog Co. v. Haven, 101 Mass. 398; People v. Devine, 17 Ill. 84; *Ex parte* Holmes, 5 Cow. (N. Y.) 426.

<sup>6</sup> State v. Ferris, *ante*.

obtained from the bankrupts any transfer to himself of the stock of such corporation. Prior to the election, however, one of the bankrupts procured from the assignee a power of attorney, not naming the attorney, however, authorizing such attorney to vote for him upon such stock at such meeting, and the bankrupt filled up the blank in such power of attorney with his own name, and voted upon such stock. The assignee did not vote or claim the right to vote upon such stock, nor did it appear that he ever authorized the bankrupt to fill up the blank in the power of attorney, by the insertion of his own name or that of any other person. The court held that the power of attorney did not authorize the bankrupt to vote upon the stock, because his name was not inserted in it by the authority of the assignee, but that he had the right to vote *because he was at the time of such election, to all intents, a stockholder*. "It has been repeatedly held," said PARK, C. J., "by this court that the books and records of a corporation determine who are its stockholders for the time being, and who have a right to vote on the stock, although the same may have been sold or pledged as collateral security. In such cases the party who appears to be the owner by the books of the corporation has a right to be treated as a stockholder, and to vote on whatever stock stands in his name." It is evident that this is the only consistent rule which can be adopted, and that the inspectors and tellers at a stockholders' meeting cannot assume to go into a hearing and decision of a question as to who is *in fact* the owner of certain stock, but have a right to rely upon the stock-book of the company as decisive of that fact. Indeed, according to all the cases, the fact that the books show that a certain person is a stockholder, is *prima facie* decisive of his right to vote.

In the case of executors or administrators of deceased stockholders, inasmuch as by operation of law they are invested with the legal title to the stock and all the rights incident thereto, they may vote thereon although there has been no transfer upon the books of the corporation, upon production of the requisite legal proof of their appointment.<sup>1</sup> A person in whose name stock stands as trustee, either for an individual or another corporation, has a right to vote thereon;<sup>2</sup> but a person in whose name stock stands *as trustee for the corporation itself*, cannot vote thereon,<sup>3</sup> as the corporation

<sup>1</sup> Matter of North Shore, &c. Ferry Co., *Mosseaux v. Urquhart*, *ante*; United States v. Columbian Ins. Co., 2 Cr. (U. S. Barb. (N. Y.) 556.

<sup>2</sup> Matter of Barker, 6 Wend. (N. Y.) 509. C. C.) 266; *Ex parte Holmes*, 5 Cow.

<sup>3</sup> Brewster v. Hartley, 37 Cal. 15; (N. Y.) 426.

cannot vote upon its own stock. In a New York case<sup>1</sup> the court, in construing the statute of that State relating to the rights of stockholders, which provided "that in all cases where the right of voting upon any share or shares of stock of any incorporated company shall be questioned, it shall be the duty of the inspector of the election to require the transfer-books of said company; and all such shares as may appear standing thereon in the name of any person or persons shall be voted on by such person or persons, directly by themselves or by proxy, subject to the provisions of the act of incorporation," held that the provision literally was broad enough to cover and include parties who might hold such stock as mere trustees. The court said: "But the question remains whether the latter are to be deemed stockholders within the spirit of the act. True, the stock on which they voted in this case stands in their name, but on the face of the entry they are declared to be mere nominal holders. The real owner of the stock should vote, especially where his name is truly expressed in the books, though it might be otherwise if he chose to have the entry simply in the name of another without expressing any trust.

"Now, these three persons, a majority of whom claim the right to vote, are mere trustees; and they are trustees, not for the directors, but the company, the corporation itself. If there could be a vote at all upon such stock, one would suppose that it must be by each stockholder of the company in proportion to his interest in it.

"This brings us to the important difficulty in the case, which is, whether stock thus held can vote at all. And we think it is not to be considered as stock held by any one for the purpose of being voted upon. No doubt the company may, from necessity, as in this case, take their own stock in pledge or payment, and keep it outstanding in trustees, to prevent its merger, and convert it to their security. But it is not stock to be voted upon, within the meaning of the charter or the general act upon which we are proceeding. It is not to be tolerated that a company should procure stock in any shape which its officers may wield to the purposes of an election, thus securing themselves against the possibility of a removal."<sup>2</sup>

<sup>1</sup> *Ex parte* Holmes, 5 Cow. (N. Y.) 426.

<sup>2</sup> *American Railway Frog Co. v. Haven*, 101 Mass. 398. But, as we have seen, stock held by trustees for the benefit of others

may be voted upon by the trustee the same as though it was his own. *Barker, ex parte*, etc., 6 Wend. (N. Y.) 509; *Hoppin v. Bufum*, 9 R. I. 513.



So the pledgor of stock<sup>1</sup> or the mortgagor thereof may vote upon the same, and if necessary a court of equity will compel the mortgagee to give the mortgagor a power of attorney to vote thereon at an election, until after foreclosure or sale.<sup>2</sup> The ground upon which this rule rests is set forth in the California case<sup>3</sup> as follows: "The question here is, not whether the pledgee or trustee to whom stock has been pledged or retransferred by a stockholder, and who appears upon the books of the corporation to be the owner, is entitled to vote, but it is, whether the agent or trustee of the pledgee, who is described in the certificate-book of the corporation as a trustee, and who holds as such trustee or agent certain shares of stock which were pledged by the corporation to its creditor, is entitled to vote such stock. The designation of McLane as trustee was sufficient to show that he did not hold the stock in his own right, and as the corporation was one of the parties to the contract, its officers are chargeable with notice of the manner in which he held the stock.

"The case falls within the principle of a New York case,<sup>4</sup> in which it was held that there could be no vote upon stock owned by the company, though held by trustees; that it was not stock to be voted upon by any one within the meaning of the charter or the general act relating to that subject. Subsequent cases,<sup>5</sup> though qualifying and restricting the broad language of that case, so as not to exclude the vote of a trustee upon the stock held in trust for a stockholder, have not questioned the doctrine that the stock belonging to the corporation, though held in the name of trustees, was not entitled to be voted upon. This doctrine must command the assent of every one, unless it can be shown that a corporation can become a stockholder, in the sense of the statute, of its own stock, receiving of itself dividends and responding to itself for calls for assessments, and being responsible for the debts of the corporation, first as a corporation and second as a stockholder."

Where stock stands in the name of a person as "cashier," "president," etc., such words are merely descriptive, and a person succeeding him in that position, has no right to vote upon the stock unless it has been transferred to him by such person.<sup>6</sup> If the charter or

<sup>1</sup> *Brewster v. Hartley*, 37 Cal. 15; *Scholfield v. Union Bank*, 2 Cr. (U. S. C. C.) 115; *Ex parte Willcocks*, 7 Cow. (N. Y.) 402.

<sup>2</sup> *Vowell v. Thompson*, 3 Cr. (U. S. R. R. Co., 19 Wend. (N. Y.) 135. C. C.) 428.

<sup>3</sup> *Brewster v. Hartley*, *ante*.

<sup>4</sup> *Ex parte Holmes*.

<sup>5</sup> *Ex parte Barker*.

<sup>6</sup> *Matter of Mohawk v. Hudson River*

general statute provides who shall be voters, that of course is decisive; and the corporation cannot by by-law or otherwise, abridge this right.<sup>1</sup> The evidence of a person's right to vote is to be found in the stock-ledger, certificate-book, and transfer-book; but in case of any discrepancy between the books, or dispute as to the right to vote, the transfer-book controls, and all the other books are subordinate thereto.<sup>2</sup>

SEC. 62. **Proxies.**— Unless the act of incorporation, general statute, or the by-laws of the corporation provide therefor, it seems to be the rule that stock cannot be voted by proxy.<sup>3</sup> But, how far the usage to vote in this manner may be held to have affected this question, remains for the courts to decide, but we may say that it is by no means improbable that, even in the absence of express authority in either of the modes stated *supra*, the courts, in view of a general usage, if established, would be inclined to hold that the common-law rule in this regard has been changed thereby. But there are cases in which it has been held that votes by proxy are not permissible except where special authority therefor is shown; but in these cases it is noticeable that no proof of such a usage was given.<sup>4</sup>

SEC. 63. **Status of a Stockholder, as to Corporate Property etc.**— **Rights as against the Corporation and its Officers.**— As has previously been stated, the interest of a stockholder in the corporate property is in proportion to the extent of his interest in the shares of stock therein. He does not, by virtue of being a shareholder, acquire any right to intermeddle with the property of the corporation, and is liable for a conversion thereof, or a trespass thereon, the

<sup>1</sup> Thus a by-law of the Passaic and Hackensack Bridge Company, declaring each proprietor entitled to as many votes as he has shares of stock, was held contrary to the charter of the company, and void. The claim of having one vote for each share does not rest on the common law or any of its principles. It wholly depends on the grant of the legislature. *Taylor v. Griswold*, 3 N. J. Eq. 222. A corporation has no power to exclude an integral part of the body, where a charter gives them a right of election. *Rex v. Spencer*, 3 Burr. 1827; *Newling v. Francis*, 3 T. R. 189; *Rex v. Head*, 4 Burr. 2515.

<sup>2</sup> *Downing v. Potts*, 23 N. J. L. 66.

<sup>3</sup> *State v. Tudor*, 5 Day (Conn.), 329.

See also *Taylor v. Griswold*, 3 N. J. Eq. 222; *Phillips v. Wickham*, 1 Paige Ch. (N. Y.) 590. *In re St. Lawrence Steamboat Co.*, 44 N. J. L., 529, in an election of officers a person holding a proxy which was not dated was not permitted to vote, upon the ground that the omission of the date was suspicious. The court held that the proxy should have been received. It was also held in the same case that votes given for a person who is ineligible for the office should not be rejected so as to give the election to another person, unless the persons voting for such officer *knew* of his ineligibility.

<sup>4</sup> *Phillips v. Wickham*, *ante*; *People v. Twaddell*, 18 Hun (N. Y.), 427; *Taylor v. Griswold*, *ante*.

same as a stranger would be. His interest in the corporation is a property interest, but he has no interest in any *specific* property, and his only right of control over the property is such as he may exercise through the election of its officers. He has a right, however, to have his interest therein protected against flagrant abuses or mismanagement by its officers, or against acts by them which are clearly *ultra vires*.<sup>1</sup> The rule may be said to be that a court of equity has jurisdiction, at the instance of a stockholder in a corporation, to restrain the corporation, and those who have the management and control of it, *from acts tending to the destruction of its franchises, from a violation of its charter, from a misuse or misappropriation of the corporate powers or property, and from other acts prejudicial to the stockholders amounting to a breach of trust*.<sup>2</sup> But where the acts sought to be enjoined are within the powers of the corporation or its officers, and the real ground of complaint is an honest difference of opinion as to what the interests of the corporation require, a court of equity has not the power, nor if it had, would it be inclined, to interfere. The directors and officers of a corporation are chosen to manage its affairs, presumably, because of their peculiar fitness therefor; and so long as they do not violate the powers conferred upon them, *and the trust with which they are confided*, it would be highly impolitic to permit the stockholders who disagree with them as to the management of the business to interfere with their plans. But, being regarded as trustees for the stockholders, the latter may in a proper case, maintain a suit in equity to restrain them from doing acts either *ultra vires*, or which, being within the scope of their corporate powers, would be a breach of their trust, or if such acts have already

<sup>1</sup> *Mills v. Northern, &c. R. R. Co.*, L. R. 5 Ch. 621. If the majority of a company propose to benefit themselves at the expense of the minority, a court of equity will protect the minority, and one stockholder may bring a bill on behalf of all the others against the company. *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. 350. A stockholder cannot bind the corporation either by his acts — *Western, &c. Mining Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406 — or his admissions; and his knowledge of facts, is not imputable to the company. *Mitchell v. Rome R. R. Co.*, 17 Ga., 574; *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 336; *Whit-*

*taker v. Johnson Co.*, 10 Iowa, 161. Except as to matters about which he has been specially authorized to act for it; and then his admission or knowledge only has effect to bind the company by virtue of his agency, and not because of his position as a stockholder. *Norwich, &c. R. R. Co. v. Cahill*, 18 Conn. 484; *Am. Fur Co. v. United States*, 2 Pet. (U. S.) 358.

<sup>2</sup> In *Pond v. Vermont Valley R. R. Co.*, 12 Blatchf. (U. S. C. C.) 280, it was held that jurisdiction will be entertained in such a case, even though the case may involve as an incidental question inquiry as to which of two boards of directors is the legal one.

been done, to procure redress for such acts.<sup>1</sup> It is a general rule that, before a stockholder can institute a suit in equity against a wrongdoer, whose acts operate to the prejudice of the interests of the stockholders of a corporation, as by diminishing their dividends and lessening the value of their stock, *an application must have been made to the directors of the company to institute a suit in the name of the company, and they must have neglected or refused to do so.* And in some cases it has been held that this refusal is essential to give a stockholder as such any standing in court; for incorporation confers on the directors, in the first instance, the authority to direct a suit.<sup>2</sup> But to this rule there are so many exceptions that it may be said that the exception, rather than the rule, prevails, *and it is now generally held to be sufficient if the bill or complaint shows a reasonable excuse for not making such a demand,*<sup>3</sup>—as, that such a demand would have been fruitless, because the suit is brought to obtain redress against the acts of the directors themselves, which are *ultra vires* or a fraud upon the stockholders.<sup>4</sup>

<sup>1</sup> Wright v. Oroville, &c. Mining Co., 40 Cal. 20; Rogers v. Lafayette Agricultural Works, 52 Ind. 296.

<sup>2</sup> Memphis v. Dean, 8 Wall. (U. S.) 64.

<sup>3</sup> Forbes v. Memphis, &c. R. R. Co., 2 Woods (U. S. C. C.), 323; Cogswell v. Bull, 39 Cal. 320; Brewer v. Boston Theatre, 104 Mass. 378; Black v. Huggins, 2 Tenn. Ch. 780; Morgan v. R. R. Co., 1 Woods (U. S. C. C.), 15; Greaves v. Gauge, 16 Abb. Pr. (N. Y.) n. s. 377; Talbot v. Scripp, 31 Mich. 263; Ware v. Bazemore, 58 Ga. 316; Young v. Drake, 8 Hun (N. Y.), 61; Craig v. Gregg, 83 Penn. St. 19; Morgan v. Railroad Co., 1 Woods (U. S. C. C.), 15. But if the bill or complaint does not state a reasonable excuse for not applying to the directors to bring the suit, the bill will be dismissed. Wilkie v. Rochester, &c. R. R. Co., 12 Hun (N. Y.), 242; Newby v. Oregon Central R. R. Co., 1 Sawyer (U. S. C. C.), 63. Foote v. Cunard Mining Co., 17 Fed. Rep. 46.

<sup>4</sup> Heath v. Erie R. R. Co., 8 Blatchf. (U. S. C. C.) 347. In Young v. Drake, 8 Hun (N. Y.), 61, the complaint alleged, in substance, that the plaintiff was the owner of 1,000 shares of the capital stock of the Smith and Parmelee Gold Company, a corporation organized under the

general laws of the State of New York, having five trustees and its principal place of business in the city of New York, and that he brought the action in behalf of himself and of all the other stockholders who should join therein. That the defendants Drake and Pritchard were trustees of said company in September, 1868; the defendant Curtis in January, 1869; two other trustees, Rufus Hatch being elected in January, 1870, and Jacob B. Jewett in January, 1871; all of whom were re-elected and were trustees when his action was brought. That on the 11th day of January, 1869, the defendant Pritchard was elected president and the defendant Drake treasurer thereof, and have ever since continued to hold said offices. That at meetings of said trustees, at which said Hatch and Jewett were not present, but at which the three named as defendants in this action constituted a quorum for the transaction of business, they voted to each other divers sums of money as salaries and for other purposes. That in pursuance of such resolutions the said Pritchard received from the treasurer, on or about the same day, the sum of \$350, and also the further sum of \$1,150 on account of salary; and the said Drake took from the company funds, in his hands as

Indeed it may be said that, while the primary party to sue for a breach of trust, committed by the directors, is the corporation, yet

treasurer, the sum of \$275, and the further sum of \$1,150 on account of salary. Then the said Pritchard and Drake, for the \$850 balance of salary respectively, and also for the further sum of \$166.66, added thereto by each, for salary beyond the time specified in said resolutions, with the knowledge and assent of the said Curtis, procured judgments against the company in the district of Gilpin county, Colorado, where the company's mining lands were situated, which judgments were entered in May term, 1871, each for the sum of \$1,066.66. That executions were issued thereon to the sheriff of the county aforesaid under which sales were made of the mining lands, mills and machinery of said Smith and Parmelee Company, in Colorado aforesaid, in 1871, of great value, but on a single bid only, in the interest of the plaintiffs in the judgments, to an amount sufficient only to cover or pay the said judgments; whereby the said Smith and Parmelee Company were divested of the lands, &c., so sold, and sustained great damages by reason thereof. And plaintiff avers that the said judgments were recovered and enforced by the said Pritchard and Drake, in collusion each with the other, and that defendant Curtis had knowledge of all the proceedings and concurred therein, the three making a majority of the trustees. That the resolutions of the trustees, by which the sums aforesaid were given to the said Pritchard and Drake, were void in law, and that the said defendants Pritchard, Drake and Curtis are liable for the amounts so unlawfully voted and paid to said Pritchard and Drake. That the recovery of judgments for the residue claimed under said resolutions, and for the additional sum of \$166.66 added thereto, without any authority whatever, was invalid; and that the said Pritchard, Drake and Curtis ought to answer for the loss to the company of the property sold under executions issued upon such judgments, and claimed judgment against the defendants Pritchard, Drake, and Curtis therefor, and that a receiver be appointed to receive the sum found to be

due by them and distribute it to the stockholders. The demurrer was overruled in the Supreme Court, and this ruling was sustained by the General Term, GILBERT, J., saying: "We think the demurrers were properly overruled. The general rule no doubt is, that an action of this kind must be brought by the corporation; but where the complaint shows that the corporation is still under the control of those who must be defendants in the suit, the stockholders, who are the real parties in interest, may bring the suit in their own names, making the corporation a party defendant; for a court of equity never permits a wrong to go unredressed merely for the sake of form. The individual defendants are in law, as well as in name, trustees, and the stockholders are the *cestuis que trustent*, and have a joint interest in all the property and effects of the corporation. Upon general principles of equity, therefore, stockholders have a right to maintain an action against the trustees of the corporation for a fraudulent breach of trust, *when it is apparent that the corporation itself will not sue for their benefit. And where the corporation is still controlled by the same trustees who are accused of the fraud, or where such accused persons are a majority of the trustees, that is sufficient evidence that the corporation will not prosecute, and that an application to the trustees to direct a suit to be brought against themselves, or the derelict majority of their members would be useless.* The law never requires the performance of a supererogatory act. It is averred in the complaint that there are only five trustees; three of them being the persons charged with having committed the fraud, are made defendants, and it is alleged that they are still trustees. The case, we think, is within the rule stated. It is enough that the plaintiff was a stockholder when the action was brought. If he purchased his stock after the alleged fraud was committed, that did not condone the fraud. The plaintiff acquired all the rights of the person of whom he purchased. *Ramsey v. Gould*, 57 Barb. (N. Y.) 398.

if the corporation refuses to sue, *or is under the control of the guilty directors*, the stockholders may sue in their individual names for themselves and all other stockholders.<sup>1</sup> But in all other cases, application must first be made to the corporation to sue. Thus, an action against a third person, to recover money belonging to the corporation, cannot be maintained by a stockholder unless the bill shows that the corporation was first applied to to bring the action, but refused or neglected to do so.<sup>2</sup> Nor does the fact that the same persons were directors of a leasing and a leased railroad, although it may entitle either corporation to do so, justify one or more stockholders in bringing an action to have the contract declared void.<sup>3</sup> But in all cases where the case shows such a condition of things touching the control of the corporate affairs by those intrusted with their management as would have rendered a formal application to the board of directors to bring the suit an idle ceremony, the defendant cannot object to the circumstance that the action is brought in the name of one stockholder for the benefit of all;<sup>4</sup> and if the corporation in which he is a stockholder enters into an illegal transaction with another corporation and makes an illegal payment out of its funds to such other corporation, a stockholder impeaching the dealings and seeking to have the funds restored to his own company, may in his own name, maintain an action against both corporations for that purpose.<sup>5</sup>

<sup>1</sup> *Hodges v. N. E. Screw Co.*, 1 R. I. 312; *Allen v. Curtis*, 26 Conn. 456; *Brown v. Vandyke*, 7 N. Y. Eq. 795; *Hensley v. Veazie*, 24 Me. 9; *Samuels v. Central, &c. Express Co.*, McCahon (Kan.), 214; *Pendicares v. Charleston Gas Light Co.*, 10 Int. Rev. Rec. 110; *Foss v. Harbottle*, 2 How. 461; *Mozley v. Alston*, 1 Phill. 796; *Cunningham v. Pill*, 5 Paige (N. Y.), Ch. 607; *Robinson v. Smith*, 3 id. 222; *March v. Eastern R. R. Co.*, 40 N. H. 548; *Wells v. Junett*, 11 How. Pr. (N. Y.) 242; *Putnam v. Sweet*, 2 Chand. (Wis.) 286.

<sup>2</sup> *Wilkie v. Rochester, &c. R. R. Co.*, *ante*.

<sup>3</sup> *Wallace v. Long Island R. I. Co.*, 12 Hun (N. Y.), 460.

<sup>4</sup> *Tazewell County v. Farmers' Loan & Trust Co.*, 12 Fed. Rep. (U. S. C. C.) 752. In a suit by a stockholder against a corporation of which he was a member, the declaration alleged a conversion and misapplication of money by the corporation

and its president, and that the latter kept false books of account and refused to pay over money rightly due plaintiff. It was held that a sufficient cause of action had been stated, without alleging that the corporation had refused to bring suit. *Brown v. Buffalo, New York, &c. R. R. Co.*, 27 Hun (N. Y.), 342. If justice to stockholders cannot be attained through an action by the corporation, they may sue, making the corporation a party defendant. It was so held, where, though a mining corporation was the party primarily aggrieved, the complaint showed special damages entitling the plaintiff subscribers to maintain the action as against defendant promoters who had retained certain proceeds of a trust sale. *Brewster v. Hatch*, 10 Abb. (N. Y.) N. C. 400.

<sup>5</sup> *Salomons v. Laing*, 6 Eng. R. R. & Canal Cas. 303. *Winch v. Birkenhead, &c., Railway Co.*, 16 Jur. 1035. But where a stockholder has remained passive for a long time, as in one case eigh-

An action by a stockholder against a corporation, to restrain it from a contemplated transaction which is *ultra vires*, may be main-

teen months, while the directors are expending large sums in the enterprise sought to be enjoined, although if he had moved in season, he might have been entitled to the remedy, yet by his *laches*, he is estopped. *Graham v. Birkenhead Railway Co.*, 20 L. J. Rep. (Ch.) 445; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159. Where the directors of a corporation have transferred its original charter without authority of stockholders, and such stockholders have subsequently participated in the company's business under a new management, or permitted the scheme to be carried out without objection, they are estopped from denying the validity of the transfer. Where the charter originally limited the amount of the stock, but on certain conditions prescribed by the legislature, authority was given to increase it, and parties claiming the right to do so, complied with the required conditions, and issued additional stock, it was held that, as between purchasers or holders and the corporation or its creditors, the former were estopped from denying the validity of their proceedings, or the validity of the stock so issued. If, through fraud or misrepresentation, parties purchase such stock, they may repudiate their contract of purchase, and be relieved of liability, provided they act promptly and are without *laches*. But when repeated assessments have been paid by them, or they have in person or by proxy taken part in the meetings of stockholders, continuing to hold such stock a year or more, and until the insolvency of the company, it will be too late to obtain relief upon allegations of fraud and misrepresentation. *Upton v. Jackson*, 1 Flip. (U. S. C. C.) 413. A corporation voted to increase its capital stock 2,000 shares out of its surplus earnings. The increase was for a special object, though not so stated in the vote, and the object immediately thereafter failed; whereupon the vote was rescinded before action taken under the former vote. A stockholder, with knowledge of the foregoing facts, a year later brought a suit in equity to compel an issue to him of stock upon the basis

of the vote before mentioned. Important transactions had intervened, and stock changed hands on the basis of the unincreased capital. It was held that the mere vote to increase gave the petitioner no vested interest, and that the company had power to rescind its vote, and that the petitioner, by his *laches* and acquiescence for so long a time, had lost whatever equity he might have had. *Terry v. Eagle Lock Co.*, 47 Conn. 141. In *Sullivan v. Portland, &c. R. R. Co.*, 4 Cliff. (U. S. C. C.) 262, a railroad corporation issued certificates known as old preferred stock, promising interest at ten per cent; in 1851 it issued bonds at the rate of ten per cent, secured by a first mortgage; in 1852 it made another issue of bonds secured by a second mortgage. The stockholders authorized the directors to waive the right to redeem the first mortgage, if the holders of the bonds would authorize their trustees to pay over four per cent of the annual interest due on their bonds to the corporation for the payment of interest on the preferred stock, if the holders would surrender their certificates and take new ones at six per cent; and in 1853 the president and treasurer were authorized to issue said new certificates whenever the arrangement should be made. New certificates were issued. In 1859 the trustees under the second mortgage took possession of the road, in order to foreclose, and remained long enough to acquire an absolute title. In 1862 a new corporation was formed which made an amicable arrangement with the holders of the first mortgage bonds. The holders of the new six per cent certificates issued in 1853 brought a bill against the new corporation to recover their proportion of the four per cent interest paid over to the treasurer. It was held that their bill should be dismissed; because, previous to 1870, a contract to pay ten per cent was usurious, and for seventeen years both parties treated the contract as executory, and never indicated by anything on record that they regarded it as a lien on any particular fund, and because complainants acquiesced in the disposition of the inter-

tained, and must be sanctioned by the court, *although all the other stockholders of the corporation are willing to assent to and affirm the proposed course of action*; but in a case of evident expediency, and where there is no attempt to go beyond the power conferred, a court of equity will not be swift to grant the stringent relief of a preliminary injunction to a stockholder assailing transactions in the corporate affairs of which the other stockholders do not complain, and to which they have given their consent.<sup>1</sup>

Although it is the undoubted right of every shareholder in a company to prevent the directors from exceeding their powers, if *it appears that the plaintiff is merely a puppet in the hands of others not shareholders in the company, who indemnify him against the costs of the suit*, the court will not interfere by interlocutory injunction.<sup>2</sup> But it seems that the circumstance that a person buys stock expressly to enable him to bring the suit, is not necessarily a ground for refusing relief.<sup>3</sup>

The reason for this is that the remedy is not for the benefit of *one* stockholder, *but for the benefit of all*, and the other stockholders cannot be denied their rights simply because the one bringing the bill is not equitably entitled. The circumstance that a plaintiff is suing at the instigation of a rival company is not of itself sufficient to prevent relief;<sup>4</sup> but when the fact is established that under the pretence of serving the interest of one company, *the shareholders in a rival company, having purchased shares for the purpose of litigation*, they cannot make the court the instrument of injuring or defeating the company into which they so intrude themselves, in order to raise questions and disputes as to matters upon which all the other members of the company may be agreed; and in such case, it is not the duty of the court to interfere. In questions on the law of contracts, where there is a discretionary jurisdiction, circumstances affecting the condition of the contracting parties, and the origin and situation of their rights in relation to the subject matter of the contract, deserve and will receive attention.<sup>5</sup>

est so many years as to be guilty of *laches*, and the new corporation took their title divested of all claims which were illegal or barred by the statute of limitations or by the foreclosure proceedings.

<sup>1</sup> Dupont v. Northern Pacific R. R. Co., 18 Fed. Rep. (U. S. C. C.) 467.

<sup>2</sup> Filder v. London, Brighton, & South Coast Railw. Co. 1 H. & M. (Eng. Ch.)

<sup>3</sup> Ramsay v. Erie R. R. Co., 8 Abb. Pr.

(N. Y.) N. S. 174. See also Young v. Drake, 8 Hun (N. Y.), 61, where it was held that the circumstance that the person bringing the suit was not a stockholder when the wrong was committed is no ground for denying relief.

<sup>4</sup> Coleman v. Eastern Counties Railw. Co., 10 Beav. 1.

<sup>5</sup> Ffooks v. London, &c. Railw. Co., 17 Jur. 365.



The bill may be brought in the name of one or more stockholders, but it must set forth that it was brought not only for themselves, but for all others similarly interested who may choose to become parties plaintiff thereto;<sup>1</sup> and it must be brought not only against the defrauding directors but also against the corporation,<sup>2</sup> and must set forth in detail the efforts made to secure the desired action on the part of the corporation, or a sufficient excuse for not having first requested such action by it, or the bill will be dismissed;<sup>3</sup> and

<sup>1</sup> *March v. Eastern R. R. Co.*, 40 N. H. 548.

<sup>2</sup> *Young v. Drake*, 8 Hun (N. Y.), 61. Because the rights of the corporation are affected by the suit. *Smith v. Hurd*, 12 Met. (Mass.) 371; *Cunningham v. Pelt*, 5 Paige Ch. (N. Y.) 607; *Hodges v. N. E. Screw Co.*, 1 R. I. 312; *Carpenter v. Robins*, 56 How. Pr. (N. Y.) 216. An association of fifteen persons, including S., G., and C., was formed to obtain a contract for the construction of the railroad of a corporation whereof S. was president and G. treasurer, and to gain control of the corporation and its property by issuing to the association, as part payment for the work, a majority of the stock of the corporation. At a meeting of a bare quorum of the directors of the corporation, including S. and G., a proposal was received from C., on behalf of himself and his associates, whose names were concealed, to construct the road, and was referred to the president, S., who made the contract as previously arranged by the association, and for the joint interest of its members. To further conceal the plot, C. transferred the contract to G. & Co., under whose name the work was done; but the association in fact performed the work, paid the expenses, and divided the profits. With a majority of the stock issued under the contract, a majority of the directors was thenceforth chosen from the association, S. continuing president. It was held, first, that the contract made by S. in the name of the corporation with C. was fraudulent and void; second, that the officers were accountable to the corporation for the abuse of their trust, and the profits realized under the contract; third, that all persons participating in the fraudulent transactions with knowledge of the facts were

equally liable with the officers; fourth, that the stockholders were the real parties in interest to maintain an action against the officers and fraudulent participators, and the corporation a proper party defendant with them. The corporation was owner of a large amount of stock in the M., a connecting railroad corporation. Both corporations were under the actual potential control of the same persons as officers. The officers of the M. misapplied its corporate funds for their personal benefit. Stock of the M. was purchased from a county by the L., and fraudulently cancelled by the officers of the two corporations; and a like amount of stock in the M. was issued without consideration to two persons as trustees for the L., of which new issue the L. was the equitable owner. It was held that stockholders of the L. might maintain a suit to compel the officers of the M. to restore to the L. the property thus wrongfully taken, without first bringing an action to compel a transfer of the stock from the two trustees to the L., if both corporations and the two trustees were joined as defendants, and the trustees had refused, on request, to institute suit to protect the property. Incident to ownership of stock in a corporation, and passing as incident to an assignment of shares thereof, is the right to receive their proportional share of all profits not divided when the purchase is completed; and it is immaterial at what time, or from what sources these profits have been earned. Stockholders are not entitled to any division of the profits and moneys of a corporation until its debts are paid. *Ryan v. Leavenworth, & Co. Railw. Co.* 21 Kan. 365.

<sup>3</sup> *Foot v. Cunard Mining Co.*, 17 Fed. Rep. 46; *Dannmeyer v. Coleman*, 8 Sawyer (U. S. C. C.), 51.

it must appear that he made an earnest, and not a simulated effort to obtain redress within the corporation, where there was time to do so, *and that he was a stockholder at the time of the transaction.*<sup>1</sup> But it has been held that all the fraudulent directors are not necessary parties to a bill brought to obtain satisfaction for a fraudulent breach of trust, this being an exception to the rule that in a proceeding in equity against trustees, all must be made parties.<sup>2</sup>

The relation of a stockholder to the corporation is one of contract, and for this reason neither the legislature nor the corporation itself can, without the consent of *all* the stockholders, change the plan or character of the enterprise;<sup>3</sup> and no majority however large can divert any portion of the capital or earnings of the company to any purpose not consistent with the original plan and intention as specified in the charter.<sup>4</sup> It is often said that any change not fundamental may be made; but this must be understood simply as meaning that any change which does not impair the contract express or implied between the corporation and its stockholders may be made; and any change or alteration either in the charter or the general plan of the corporation which does impair this contract violates the rights of each and every stockholder who has not expressly or tacitly assented thereto; and, although he stands alone in his opposition, a court of equity will at his instance restrain such acts on the part of the corporation.<sup>5</sup> Thus, where a charter is granted to a railroad company to build and operate a railroad between certain termini, authority is not given to build and operate a railroad between other and different termini, nor to engage in any other different or independent business; and it is a part of the contract implied between the corporation and the subscribers to its stock, *that the funds raised from the subscription shall not be used for the construction of a different line of railroad,*<sup>6</sup> *or for the prosecution of any other or independent business.* Thus, in an English case,<sup>7</sup> the defendant corporation was restrained from carrying on a trade in coal, in connection with its business as a railway com-

<sup>1</sup> *Dannmeyer v. Coleman, ante.*

<sup>2</sup> *Protection Ins. Co. v. Dummer*, cited 5 Paige (N. Y.) Ch. 607; *Cunningham v. Pell, ante*; *Mayne v. Griswold*, 3 Sandf. (N. Y.) 463.

<sup>3</sup> *Middlesex Turnpike Co. v. Locke*, 8 Mass. 268.

<sup>4</sup> *Black v. Del. & Raritan Canal Co.*, 22 N. J. Eq. 130; *Affid.* 24 id. 435; *Kean v. Johnson*, 9 id. 401.

<sup>5</sup> *Attorney-General v. Great Northern Railw. Co.*, 6 Jur. (N. S.) 1006; *McCrary v. Junction R. R. Co.*, 9 Ind. 358; *Winter v. Muscogee R. R. Co.*, 11 Ga. 438; *Kean v. Johnson, ante*; *Black v. Del. & Raritan Canal Co., ante.*

<sup>6</sup> *Stevens v. Rutland, &c. R. R. Co.*, 29 Vt. 545.

<sup>7</sup> *Attorney-General v. Great Northern Railw. Co.*, 7 Jur. 1006.

pany. Said KINDERSLEY, V. C.: "Is such an act illegal? Now here again, it appears to me that this question is hardly arguable on this point. . . . Although the act of Parliament, which constitutes and incorporates the company contains no prohibition in express terms against engaging in any other business except that of making and maintaining and using the railway, *there is implied in every such act of Parliament, a prohibition*, or (looking at it as a contract) *a contract against ever engaging in any other business than that of a railway company.*"<sup>1</sup> But without stopping to discuss these questions fully in this place,<sup>2</sup> it may be said that this rule is not so narrow in its application as to prohibit such corporations from transacting such subordinate and connected business as is convenient to the prosecution of the main business, although perhaps not strictly essential thereto,<sup>3</sup> or from engaging in matters which come fairly within the scope of their powers, although not primarily contemplated by their founders,<sup>4</sup> or which becomes essential to its existence or to the carrying out of its original plan or business.<sup>5</sup> The stockholder can only complain when the acts of the corporation are *ultra vires*, and not within the scope of its express or implied powers.

**SEC. 64. When Stockholders may Defend a Suit against a Corporation.** — There are instances in which a stockholder may intervene in defence of an action against a corporation. Thus, in an action against a corporation, a judgment in which would be presumptive evidence against the stockholders in actions against them on their individual liability, the stockholders are interested to assist the defence; and, if the attorneys of the corporation decline further defending on the ground of non-payment of their fees, the corporation having become insolvent, the stockholders may intervene; and, at their instance, the court will, in a proper case, relieve the corporation from a default, and allow them to carry on the litigation,<sup>6</sup>

<sup>1</sup> See also *Natusch v. Irving*, 2 Cooper Ch. Cas. Part 2, 358.

<sup>2</sup> They will be fully treated under the head of "Powers of Railroad Corporations."

<sup>3</sup> *Watt's Appeal*, 78 Penn St. 370; *Rutland & Burlington R. R. Co. v. Proctor*, 29 Vt. 93; *Pearce v. Madison, &c. R. R. Co.*, 21 How. (U. S.) 442; *Downing v. Mt. Washington Co.*, 40 N. H. 230; *Shawmut Bank v. Plattsburgh, &c. R. R. Co.*, 31 Vt. 491; *Wheeler v. San Francisco, &c. R. R. Co.*, 31 Cal. 46.

<sup>4</sup> *Atlantic, &c. R. R. Co. v. St. Louis*, 66 Mo. 228; *Lyde v. Eastern Bengal Railw. Co.*, 36 Beav. 10.

<sup>5</sup> *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Leifchild's Case*, L. R. 1 Eq. 231.

<sup>6</sup> *Peck v. N. Y. & Liverpool, &c. Steamship Co.*, 3 Bosw. (N. Y.) 632. A stockholder of a defunct corporation has such an interest as entitles him to defend a suit brought to foreclose a mortgage alleged to have been executed by the corporation when alive. *Chouteau v. Allen*,

**SEC. 65. Cannot bring Action at Law against Directors for Damages.**

—An individual stockholder cannot maintain an action at law against the directors of a corporation, for damages which he has sustained by reason of their fraud or mismanagement of the affairs of the corporation. If he has any remedy at law in such a case, it is against the corporation, to which the directors are responsible.<sup>1</sup> His remedy is in a court of equity.<sup>2</sup>

**SEC. 66. Right to Dividends.**—A stockholder cannot compel a corporation to declare a dividend, as the expediency of doing so must necessarily be confided to the directors; and as they are invested with a discretion in the matter, the courts will not interfere therewith except in rare and exceptional instances. The usual remedy is to be had by a change in the board of directors.<sup>3</sup> But

70 Mo. 290. They have a remedy in chancery against the directors to prevent them from doing acts which would amount to a violation of the charter, or to prevent any misapplication of the capital or profits which might lessen the value of the shares, if the acts intended to be done amount to what is called in law a breach of trust or duty. So also a stockholder has a remedy against individuals, in whatever character they profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. *Wilcox v. Bickel*, 11 Neb. 154. They may bring suit to cancel a deed purporting to have been made by the corporation, as a cloud on the title of the corporation. *Baldwin v. Canfield*, 26 Minn. 43.

<sup>1</sup> *Smith v. Poor*, 40 Me. 415; *Allen v. Curtis*, 26 Conn. 455; *Housdon v. Cope-land*, 16 Me. 314; *Evans v. Brandon*, 53 Tex. 56.

<sup>2</sup> *Smith v. Hurd*, 12 Met. (Mass.) 371; *Sears v. Hotchkiss*, 25 Conn. 171; *Bishop v. Houghton*, 1 E. D. S. (N. Y. C. P.) 566.

<sup>3</sup> *Louisiana v. Bank of Louisiana*, 6 La. 745; *Jermain v. Lake Shore, &c. R. R. Co.*, 91 N. Y. 433; *Beers v. Bridgeport Spring Co.*, 42 Conn. 21; *Karnes v. Rochester, &c. R. R. Co.*, 4 Abb. Pr. (N. Y.) n. s. 107; *Brown v. Monmouthshire Railw. Co.*, 15 Jur. 475; *Barnard v. Vt. & Mass. R. R. Co.*, 7 Allen (Mass.), 521. Even though the articles of association

provide that there shall be a semi-annual dividend, it is competent for the directors not to declare a dividend; and a stockholder cannot maintain a bill to enjoin the collection or sale of the securities he has given the association for his shares because a dividend was not declared. *Ely v. Sprague*, Clarke Ch. (N. Y.) 351. A mandamus will not lie to compel a corporation to produce its books for the purpose of declaring a dividend. *Rex v. Bank of England*, 2 B. & Ald. 620. See *Williston v. Michigan Southern, &c. R. R. Co.*, 13 Allen (Mass.), 400, as to relief by stockholders of guaranteed stock against a foreign corporation. Also *Chase v. Vanderbilt*, 37 N. Y. Superior Ct. 384, as to dividends by a consolidated company out of the earnings of one of the companies before consolidation. *Karnes v. Rochester, &c. R. R. Co.*, 4 Abb. Pr. (N. Y.) n. s. 107. A stockholder is not entitled to any of the property or profits of a corporation until a division has been made, or a dividend has been declared. *Boardman v. Lake Shore & Michigan Southern R. R. Co.*, 84 N. Y. 157; *Chicago, &c. R. R. Co. v. Page*, 1 Biss. (U. S. C. C.) 461; *Hyatt v. Allen*, 56 N. Y. 553; *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393. If the directors unreasonably refuse to divide the surplus earnings from time to time, they may be compelled to do so by the courts. *Scott v. Eagle F. Ins. Co.*, 7 Paige Ch. (N. Y.) 198. But the courts will interfere with the discretion of directors with great reluctance, and only in

when a dividend is declared, *eo instanti* a debt is thereby created against the corporation in favor of each stockholder, to the extent of the amount of stock held by him, for the amount of dividend to which his stock is entitled. An actionable promise arises by implication in all cases in which the duty is definite and due to the individual; *but when such duties are indefinite, or are due to the members in their collective capacity*, no such promise can be implied. Thus, the duty resting upon a corporation, where profits are in hand, to distribute them among the shareholders in the form of dividends, is indefinite and discretionary in its nature, and is in no sense due to any particular member, but to the community of members, for the performance of which no promise can be implied in favor of the separate stockholders. *But after a dividend is declared*, the right to the profits becomes individualized, and the duty to distribute in certain proportions attaches as a right in favor of each member; and therefrom arises an implied promise to pay it on demand, which can be enforced by action.<sup>1</sup> But an action cannot be maintained

rare and exceptional instances, when they are acting in bad faith, — *State v. Bank of Louisiana*, 6 La. 745, — or from a wilful abuse of their discretion. *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393; *Beers v. Bridgeport Spring Co.*, 42 Conn. 117; *State v. Bank of Louisiana*, 6 La. 745; *Ely v. Sprague*, Clarke Ch. (N. Y.) 351; *Pratt v. Pratt*, 33 Conn. 446; *Stevens v. So. Devon Railw. Co.*, 9 Hare, 313; *Karnes v. Rochester, &c. R. R. Co.*, 4 Abb. Pr. (N. Y.) 417; *Thompson v. Erie R. R. Co.*, 45 N. Y. 468; *Scott v. Eagle F. Ins. Co.*, 7 Paige Ch. (N. Y.) 198; *Chase v. Vanderbilt*, 62 N. Y. 307; *Williston v. Michigan Southern, &c. R. R. Co.*, 13 Allen (Mass.), 400; *Howell v. Chicago, &c. R. R. Co.*, 51 Barb. (N. Y.) 378. The property of a corporation belongs to it, and can only be sued for and recovered in its name, although all the stock belongs to one person. *Button v. Hoffman*, Wis. S. C., 20 N. W. Rep. 667. Its members are merged in the corporation, and the right of control over, or alienation of its property is in it. *Railroad Co. v. Railroad Co.*, 23 Minn. 359; *Van Allen v. Assessors*, 3 Wall. (U. S.) 584. If one person owns nearly all the stock of a corporation, and is its president, superin-

tendent, and general manager, he has no authority as such to mortgage the corporate property. *Stowe v. Wyse*, 7 Conn. 214; *C. & N. W. R. R. Co. v. Jones*, 24 Wis. 388.

<sup>1</sup> *Jackson v. Newark Plank Road Co.*, 31 N. J. L. 277; *Coles v. Bank of England*, 10 Ad. & El. 437; *Davis v. Bank of England*, 2 Bing. 393; *Carpenter v. N. Y. & N. H. R. R. Co.*, 5 Abb. Pr. (N. Y.) 277; *Keppel v. Petersburg, &c. R. R. Co.*, Chase Dec. (U. S.) 167; *Feistel v. King's College*, 10 Beav. 491; *City of Ohio v. Cleveland, &c. R. R. Co.*, 6 Ohio St. 489; *King v. Patterson, &c. R. R. Co.*, 29 N. J. L. 504; *LeRoy v. Globe Ins. Co.*, 2 Edwards Ch. (N. Y.) 657. And if the dividend is declared, the time for its payment to be fixed by the directors at a future day, and the directors upon demand neglect or refuse to fix the time of payment, or if they subsequently divert the funds set apart for the payment of a dividend, a court of equity will enforce payment, or, if necessary, will compel the corporation to declare a dividend. *Beers v. Bridgeport Spring Co.*, 42 Conn. 21; *Pratt v. Pratt, Read, & Co.*, 33 Conn. 446; *Scott v. Eagle Fire Ins. Co.*, 7 Paige Ch. (N. Y.) 203. When a dividend is declared, the funds of the corporation to

therefor until a demand of payment has first been made,<sup>1</sup> or if payable at a future day named, until after the lapse of such day and a demand of payment.<sup>2</sup>

that extent are individualized, and a debt in favor of each stockholder to the extent of the stock held by him is created. *Scott v. Central R. R. Co.*, 52 Barb. (N. Y.) 45; *Kane v. Bloodgood*, 7 John. Ch. (N. Y.) 90; *Westchester R. R. Co. v. Jackson*, 77 Penn. St. 371; *LeRoy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657; *Philadelphia, &c. R. R. Co. v. Cowell*, 28 Penn. St. 329; *Ehle v. Chittenango Bank*, 24 N. Y. 548; *King v. Patterson, &c. R. R. Co.*, 29 N. J. L. 82; *id.* 504; *State v. Baltimore, &c. R. R. Co.*, 6 Gill (Md.), 363; *Chase v. Vanderbilt*, 37 N. Y. Superior Ct. 334. And he may recover the amount in an action of general assumpsit for money had and received. *King v. Patterson, &c. R. R. Co.*, *ante*. But he can only sue for himself; and if a bill in equity is brought to restrain the payment of a dividend already declared, he must bring it in his own name, and cannot bring it in behalf of himself and all other stockholders. *Carlisle v. Southeastern Railw. Co.*, 13 Beav. 295. A remedy may also be had in equity in a proper case for a dividend declared but not paid (*Beers v. Bridgeport Spring Co.*, 24 Conn. 17). But its payment cannot be compelled by mandamus. *People v. Central, &c. Co.*, 41 Mich. 166. A bill in equity is the appropriate and only remedy. An action at law would not lie, as the directors had not fixed the time of payment. *Scott v. Eagle Fire Ins. Co.*, 7 Paige (N. Y.), 203; *Pratt v. Pratt, Read, & Co.*, 33 Conn. 446. If the earnings of the company have not been separated from the capital by the directors, and placed to the credit of the stockholders, it will be the duty of the court to compel the company to divide the earnings. The power to determine whether they shall pay dividends is not wholly vested in the directors, or the majority of the corpora-

tors. This power rests with the court. *Barnard v. Vt. & Mass. R. R. Co.*, 7 Allen (Mass.), 521. The stockholders are presumed to have invested their money for the purpose of obtaining annual returns. Before extending its business, therefore, the company should increase its capital, and the directors, by taking the earnings for that purpose, commit a gross violation of their duty. And if the directors have wrongfully invested the earnings which have been set apart as dividends, their only remedy would be an increase of capital. *Hoole v. Great Western Railw. Co.*, L. R. 3 Ch. App. 269. Failing in this, if money to pay dividends declared as stated *supra* could not be borrowed on the credit of the company, its affairs should be wound up, the dividends paid over, and capital divided. *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 49. The directors, by declaring dividends, separate the earnings of the company from the capital stock, and they thereby become the property of the stockholders, and no longer remain the property of the corporation. *Williston v. Michigan Southern R. R. Co.*, 13 Allen (Mass.), 404. They are none the less dividends because the time for their payment was afterwards to be fixed by the directors. *Price v. Anderson*, 15 Sim. 473; *McLaren v. Stainton*, 3 DeG. F. & J. 202; *DeGendre v. Kent*, L. R. 4 Eq. Cas. 283; *Earp's Appeal*, 28 Penn. St. 368; *Foote, Appellant*, 22 Pick. (Mass.) 299; *Balch v. Hallet*, 10 Gray (Mass.), 402; *March v. Eastern R. R. Co.*, 43 N. H. 515; *Van Doren v. Olden*, 19 N. J. L. 117; *King v. Patterson & Hudson River R. R. Co.*, 29 id. 82, 504; *Jackson v. Newark Plank Road Co.*, 31 id. 277; *Spear v. Hart*, 3 Robt. 420; *Clarkson v. Clarkson*, 18 Barb. (N. Y.) 646; *Simpson v. Moore*, 30 id. 637; *LeRoy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657.

<sup>1</sup> *State v. Baltimore, &c. R. R. Co.*, 6 Gill (Md.), 363; *Hagar v. Union National Bank*, 63 Me. 509. A mere letter of in-

quiry is not sufficient. *Scott v. Central, &c. R. R. Co.*, 52 Barb. (N. Y.) 45.

<sup>2</sup> *Beers v. Bridgeport Spring Co.*, 42 Conn. 17.

All dividends must be equal and just among all those who are interested, and if any unjust discrimination is made, giving one class an unfair advantage over another, a court of equity has power to correct the wrong.<sup>1</sup> So too a dividend must be declared out of the *earnings* or profits of a corporation, and if a dividend is declared where there has in fact been no money earned with which to pay it, its payment will, unless the power to declare the dividend otherwise than from the profits is specially given by statute, be enjoined upon the application of a stockholder.<sup>2</sup> "Dividends" said Lord

It was not necessary that there should be cash in hand, or on deposit, to the amount of the dividend declared, to entitle the petitioners to payment. *Stringer's Case*, L. R. 4 Ch. App. 492. Nor did it make any difference that a part of the dividend declared was invested in property belonging to the corporation, and the capital increased thereby. *Reed v. Head*, 6 Allen (Mass.), 174; *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542. The directors, having declared a dividend, have no power to take it from the credit of the stockholders and carry it to a surplus fund account. This could not be done without the consent of the stockholders. *Dodge v. Woolsey*, 18 How. (U. S.) 341.

<sup>1</sup> *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. (N. Y.) 510; *Ryder v. Alton, & C. R. R. Co.*, 13 Ill. 516; *Harrison v. Mexican R. R. Co.*, L. R. 19 Eq. 319; *Hoole v. Great Western Railw. Co.*, L. R. 3 Ch. 262; *Atlantic, & C. Tel. Co. v. Commonwealth*, 3 Brews. (Penn.) 366. In *State v. Baltimore, & C. R. R. Co.*, 6 Gill (Md.), 363, it was held that while the directors are the sole judges of the propriety and the means of declaring dividends, yet they cannot declare a money dividend of three dollars to all stockholders having less than fifty shares each, and a dividend of one dollar in money and two dollars in the bonds of the company to those having more than fifty shares each, as such a discrimination is unequal and unjust.

<sup>2</sup> *Painesville, & C. R. R. Co. v. King*, 17 Ohio St. 534; *Carpenter v. N. Y. & N. H. R. R. Co.*, 5 Abb. Pr. (N. Y.) 277; *Burnes v. Pennell*, 2 H. L. Cas. 497. But the stockholder bringing the bill must show that he is entitled to share in the dividend. *Carlisle v. Southeastern Railw.*

*Co.*, 14 Jur. 535. The payment of dividends out of the capital stock will be restrained. *Bloxham v. Metropolitan Railw. Co.*, L. R. 3 Ch. 337. Nor will a corporation be permitted to pay dividends out of money necessary to make repairs. *Dent v. London Tramway Co.*, 1 Am. & Eng. R. R. Cas. 592. But a court of equity will not restrain the payment of a dividend to stockholders at the suit of another company claiming the right of distress for the non-payment of toll charges. *South Yorkshire Railw. Co. v. Great Northern Railw. Co.*, 9 Exchq. 55. The declaring of a dividend where none has been earned is regarded as a fraud upon those who purchase the stock at a value which has been enhanced by such dividends; and in a proper case the transfer will be set aside. *Burnes v. Pennell*, 2 H. L. Cas. 497; *Stainbank v. Fearnley*, 9 Sim. 556. And a party defrauded thereby, has his remedy at law. But a court of equity will not restrain the payment of a dividend merely upon the ground that the directors have acted in violation of their duties to the public. *Brown v. Monmouthshire Railw. & Canal Co.*, 13 Beav. 32; *Stevens v. South Devon Railw. Co.*, 9 Hare, 313. Money to compensate a corporation, whose property consisted of a wharf and dock, for part of its real estate taken by right of eminent domain, if distributed as a dividend to the shareholders, belongs to the capital, and not the income of a trust fund invested in the shares. An action to secure the application of future earnings of the defendant to the payment of dividends due on preferred stock, was brought by one of the holders of such stock on his own behalf, and on behalf of others having like grounds of complaint. It was held,

CAMPBELL,<sup>1</sup> "are supposed to be paid out of profits only, and where directors order dividends to be paid where no such profits have been made, without expressly saying so, a gross fraud is practised, and the directors are not only civilly liable to those whom they have deceived and injured, but are guilty of conspiracy for which they are liable to be prosecuted and punished." Where dividends have been paid to stockholders out of the capital, or what is the same thing, out of money borrowed for that purpose, a receiver of the company may recover of the stockholders the sums received by them as dividends; and the same is also true as to dividends paid while the company was insolvent.<sup>2</sup> And where there is spurious stock of the corporation outstanding, a holder of genuine stock may bring a bill to restrain the corporation from paying dividends upon it.<sup>3</sup> So a corporation may be restrained from paying dividends already declared, where it has no surplus earnings,<sup>4</sup> or where, although it had a sufficient surplus when the dividend was declared, yet before it became due the surplus was swept away by the fraud of one of its officers or other unforeseen circumstances.<sup>5</sup> But after a dividend has been declared and paid to a part of the stockholders, the corporation cannot defend against an action by the other shareholders for their share of the dividend, upon the ground that the dividend has not been earned, and that its payment would operate as a withdrawal of a part of the capital.<sup>6</sup> "We do not" said HINMAN,

first, that it was brought in proper form; second, that the stockholders of the defendant were not necessary parties. The net earnings of the defendant before the action was brought had been, in part, appropriated to dividends upon common stock. It was held that the owners of preferred stock were entitled to interest on the dividends they were entitled to receive from the time of such appropriation. *Heard v. Eldredge*, 109 Mass. 258; *Prouty v. Michigan & Northern Indiana R. R. Co.*, 4 T. & C. (N. Y.) 230. A consolidated corporation has no power to declare a dividend, as such, out of the earnings made prior to the consolidation by one of the companies which was merged in the consolidation, or dividends on the stock of that company out of the earnings of the consolidated one, and courts will not compel it to declare such a dividend. *Chase v. Vanderbilt*, 37 N. Y. Superior Ct. 344.

When a dividend has been declared, and the money with which to pay it has been set apart or deposited, the stockholders acquire a lien in equity thereon, which will be enforced by a court of equity even in the hands of a receiver. *Matter of LeBlanc*, 4 Abb. N. C. (N. Y.) 221.

<sup>1</sup> *Burnes v. Pennell*, *ante*.

<sup>2</sup> *Osgood v. Laytin*, 3 Keyes (N. Y.), 521.

<sup>3</sup> *Underwood v. N. Y. & N. H. R. R. Co.*, 17 How. Pr. (N. Y.) 537.

<sup>4</sup> *Carpenter v. N. Y. & N. H. R. R. Co.*, 5 Abb. Pr. (N. Y.) 277; *Carlisle v. Southeastern Railw. Co.*, 13 Beav. 295.

<sup>5</sup> *Fawcett v. Laurie*, 1 Dr. & Sm. 192. But if specific funds had been set apart for its payment, the rule would be otherwise. *LeRoy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657.

<sup>6</sup> *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542.



C. J., "as between these parties, consider the question whether the company was in a proper condition to declare so large a dividend as twenty-five per cent upon its capital, as of any importance. When the other stockholders are willing to repay the company the funds they assume they have withdrawn from it, they will stand in a better condition to call upon the court, by some proper application for that purpose, to restrain the plaintiff from withdrawing a part of the capital in the shape of a dividend. Upon the case as presented upon this point, assuming that the plaintiff has paid for his stock in full, the equities are all in his favor; since, when he has received his dividend, he will then be in precisely the same condition as the other stockholders." If, after having been duly notified that a dividend has been declared, a stockholder does not within a reasonable time call for his money, and the bank in which it was deposited fails, the loss falls upon the stockholder, and not upon the corporation.<sup>1</sup>

SEC. 67. **Net Earnings, What are** — In a case heard in the United States Circuit Court,<sup>2</sup> the court say: "Net earnings are properly the gross receipts, less the expenses of operating the road or other business of the corporation. Interest on debts is paid out of what thus remains, that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go toward dividends, which, in that way, are paid out of the net earnings."<sup>3</sup> And the word 'liabilities' is intended to embrace not only debts already matured, but those which exist but have not matured. Thus in a New York case a stockholder brought a suit against a corporation, to compel it to declare a dividend. The facts were as follows: The corporation had on hand, on deposit and securities, \$36,000. Its floating debt was \$1,000, and the funded debt, payable in seventeen years at six per cent, was \$75,000. The yearly current expenses, including interest on the funded debt, was about \$10,000, and the corporation had no immediate need of the surplus on hand, or of its earnings, except to pay the current expenses. The court observed: "The property of every corporation, including all its earnings and

<sup>1</sup> King v. Patterson, &c. R. R. Co., 29 N. J. L. 82.

<sup>2</sup> St. John v. Erie R. R. Co., 10 Blatchf. (U. S. C. C.) 271; affirmed in

the Supreme Court of the United States in 22 Wall. (U. S.) 146.

<sup>3</sup> See also opinion of BRONSON, J., in People v. Supervisors, 4 Hill (N. Y.), 20; s. c. on appeal, 7 id. 504.

profits, belongs, primarily, to such corporation, exclusively, and not to its stockholders, individually or collectively. They have a certain claim, it is true, but their claims are always subordinate to the claims of creditors, and the latter approach much nearer to the condition of ownership than the former. No stockholder can entitle himself to any dividend, or to any portion of the capital stock, until all debts are paid. The funds on hand, which the plaintiff asks to have divided and distributed among the stockholders, are only about half sufficient to pay the indebtedness of the defendant. It is of no sort of consequence, in a legal point of view, that the debt is not yet due, and has a number of years to run before it matures. The creditors still have the better right to the funds, which the defendant holds for them in trust. The court cannot undertake to say judicially, that the future business of the corporation will be prosperous; nor has it any right to postpone the rights and claims of creditors to future earnings and accumulations, even if it could be certain they would accrue. The board of directors, in their discretion and in view of all the facts within their knowledge, might do this, but no court, I apprehend, would ever undertake to deal in such a manner with the funds of the corporation which was indebted to an amount at least double the fund sought to be distributed. . . . The corporation does not stand in any fiduciary relation to its stockholders. . . . The stockholders are in no sense creditors of the corporation, nor are they in the situation of partners. They are constituent parts of the corporate body. In a general sense, a corporation may be regarded as the trustees of its creditors, but not of its stockholders. The action has, therefore, no foundation of a trust to support it.”<sup>1</sup> This case, which we believe expresses a

<sup>1</sup> *Karnes v. Rochester, &c. R. R. Co.*, 4 Abb. Pr. (N. Y.) N. s. 107; *Utica v. Churchill*, 33 N. Y. 238. See also *People v. Commissioners*, 35 id. 423; s. c., 4 Wall. (U. S.) 244; *Waterman v. Troy, &c. R. R. Co.*, 8 Gray (Mass.), 433; *Cunningham v. Vermont, &c. R. R. Co.*, 12 id. 411; *McLaughlin v. Detroit, &c. R. R. Co.*, 8 Mich. 100; *City of Ohio v. Cleveland, &c. R. R. Co.*, 6 Ohio St. 489. Accumulated earnings, on which no dividend has been declared, furnish no consideration for issuing stock to be divided among stockholders. Such dividends are *ultra vires*. *Hatch v. Western Union Tel. Co.*, 9 Abbott's New Cases (N. Y.), 430. The

claims of stockholders to dividends are subordinate to the claims of creditors. *Ryan v. Leavenworth, Atchison, & Northwestern Railw. Co.*, 21 Kan. 365. The same principles which apply to partnerships in relation to the division of profits apply to corporations, and the majority can overrule the minority upon the questions of the division of profits while the corporate debts are still unprovided for. *Stevens v. South Devon R. R. Co.*, 9 Hare, 313. Where a stockholder receives dividends from a corporation, declared and admitted by it to be due to him on stock, an action is not maintainable against him in the first instance by

sound and just doctrine, illustrates the discretion which directors have in such matters. While a court upon such a state of facts would not compel the directors to declare a dividend, yet upon the other hand, if the directors in the exercise of their discretion under such a state of facts should declare one, the courts would not restrain its payment upon the ground that unmatured debts existed, especially where such debts have a considerable period to run, and there are no evidences of fraud; because the directors themselves are deemed the best judges as to the state of the business of the corporation, and its prospects for the future.

Says Mr. BRICE<sup>1</sup>: "The term 'profits' is ambiguous. It may denote either the net earnings, deducting merely current working expenses, not therein including the interest on money borrowed, or what, if anything, remains after defraying every expense, as paying off loans, if any falling due, as well as the interest thereof."<sup>2</sup>

Where money has been raised by virtue of express powers in that behalf, it has been settled that profits will have the former and wider meaning<sup>3</sup> The Master of the Rolls, in that case, was of opinion "that all the debts of the company are first payable, other than those which, for want of a better expression, may be called funded debts; for instance, if the defendants have raised money by mortgage, under the powers contained in their act, for the purpose of completing their line, this does not constitute such a debt as can be paid off out of the profits, before the profits are divided. But, on the other hand, any debts which have been incurred, and which are due from the directors of the company, either for steam-engines, for rails, for completing stations, or the like, which ought to have been and would have been paid at the time, had the defendants possessed the necessary funds for that purpose, — those are so many deductions from the profits, which, in my opinion, are not ascertained till the whole of them are paid."<sup>4</sup> His lordship accordingly decided that the holders of preference shares, created in pursuance of the company's statutory powers,

one claiming to be entitled to share in the dividends, but whose rights had been ignored by the corporation, to recover, as for money had and received, the proportion of the dividends so received which the plaintiff would have been entitled to had his shares participated. *Peckham v. Van Wagenen*, 83 N. Y. 40.

<sup>1</sup> Green's *Brice's Ultra Vires*, 161.

<sup>2</sup> As to bonuses, see *Rance's Case*, L. R. 6 Ch. 104.

<sup>3</sup> *Corry v. Londonderry & Enniskillen Railw. Co.*, 29 Beav. 263.

<sup>4</sup> As to what items are properly chargeable to revenue and capital account respectively, see the remarks of the Lord Chancellor in *Mills v. Northern Railw. of Buenos Ayres Co.*, L. R. 5 Ch. 621, 631.

were not entitled to be paid off out of the surplus profits remaining after the interest on such preference shares had been met.

The case, however, would be different with respect to ordinary loans to the company while transacting its usual every-day business — *e. g.*, advances by bankers. These loans are simply debts which have to be defrayed before profits or dividends can be declared.

A clause is sometimes inserted in charters or in the general law, allowing interest to be paid, — sometimes to preference, sometimes even to ordinary shareholders, — out of capital before the company has commenced business, or it may be afterwards, during times of adversity, when its losses counterbalance its gains. Whether such a provision is legal and valid may fairly be questioned; the manifest tendency of it is to waste, and in the result to destroy, the capital of the company, in carrying out objects *aliunde* those for the prosecution of which it was created.

But certainly without it, shareholders can receive interest only out of the net earnings.<sup>1</sup> Thus, in the case last cited, in overruling a demurrer to a bill, which stated that at an ordinary general meeting it had been determined that interest should be paid to the shareholders, although as yet no profits had been realized, and which prayed an injunction to restrain the same, PAGE WOOD, V. C., said: "On grounds of public policy, and on every principle, not only of honesty as regards the public generally, but of the interests of this company itself, I feel bound to prevent this proceeding." In another case,<sup>2</sup> the same judge decided, and, on appeal, the Lord Chancellor CHELMSFORD inclined to the same opinion, that it was *ultra vires* for the defendants to declare a dividend upon their ordinary stock, out of a sum of money received from the contractors, as penalty and interest in respect of unfinished lines.

Whether interest can be capitalized, — that is to say, whether a company, when, either in the course of constructing its works or subsequently, it makes no profits, can declare interest on its shares, and treat such interest as a debt due from the company, or in lieu

<sup>1</sup> *Macdougall v. Jersey Imperial Hotel Co., Limited*, 2 H. & M. 528. Followed in *Salisbury v. Metropolitan Railw. Co.*, 38 L. J. (Ch.) 249, where, however, the defendant's act of incorporation expressly provided that "It shall not be lawful for the company, out of any money by this act, or by any other act relating

to the company, authorized to be raised by calls in respect of shares, or by the exercise of any power of borrowing, to pay interest or dividend to any shareholder," etc.

<sup>2</sup> *Bloxham v. Metropolitan Railw. Co.*, L. R. 3 Ch. 387.

thereof issue shares, either of which proceedings is plainly very different from payment out of capital, — must, upon the authorities, be considered doubtful. But in this country it is held that a railroad company may contract that interest shall be paid on stock subscriptions while its road is in process of construction, and until it is completed and goes into operation, payable whenever its surplus earnings shall enable it to pay it.<sup>1</sup> But an absolute agreement to pay interest upon stock, whether earned or not, is equivalent to a contract to pay dividends whether there are funds or not, and unless expressly authorized by statute is clearly opposed to public policy, *ultra vires*, and void.<sup>2</sup>

SEC. 68. **Effect of declaring Dividends: To whom Payable**—When a dividend is declared, it becomes a debt due from the corporation to the individual stockholder; and if the corporation deposits the money with a bank for the benefit of the stockholder, it does not thereby release itself from liability to the stockholder, in case of a failure of the banking company to pay the same.<sup>3</sup> But, according to the case last cited, if the stockholder has had due notice of the dividend, the burden of proving which is on the corporation, if he neglects for an unreasonable time to call for his money the loss is wholly upon him. A stockholder in a moneyed corporation may sell and transfer his shares to whom he pleases, and the corporation has no right to restrain him in so doing. Such stock entitles the owner to his proportion of the dividends, which may be from time to time declared;<sup>4</sup> and a devise of the dividends without qualification, has been held to carry with it the stocks themselves.<sup>5</sup> Ownership of stock is essential to a recovery from a corporation, of dividends. Mere possession of the certificate of stock, or even a special property therein, is not enough.<sup>6</sup> The right to the dividends follows

<sup>1</sup> Richardson v. Vt. & Mass. R. R. Co., 44 Vt. 613; City of Ohio v. Cleveland, &c. R. R. Co., 6 Ohio St. 489; Rutland, &c. R. R. Co. v. Thrall, 35 Vt. 536; McLaughlin v. Detroit, &c. R. R. Co., 8 Mich. 100; Waterman v. Troy, &c. R. R. Co., 8 Gray (Mass.), 433; Cunningham v. Vt. & Mass. R. R. Co., 12 id. 411.

<sup>2</sup> McLaughlin v. Detroit, &c. R. R. Co., *ante*; Miller v. Pittsburgh, &c. R. R. Co., 40 Penn. St. 237; Troy & Boston R. R. Co. v. Tibbetts, 18 Barb. (N. Y.) 297; Pittsburgh, &c. R. R. Co. v. Allegheny Co., 63 Penn. St. 126; Paines-

ville, &c. R. R. Co. v. King, 17 Ohio St. 534.

<sup>3</sup> King v. Patterson R. R. Co., 29 N. J. L. 82, 504.

<sup>4</sup> Brightwell v. Mallory, 10 Yerg. (Tenn.) 196; State v. Franklin Bank, 10 Ohio, 90. But a stockholder must prove a demand before he can maintain an action for a dividend. Scott v. Central, &c. R. R. Co., 52 Barb. (N. Y.) 45.

<sup>5</sup> Collier v. Collier, 3 Ohio St. 374.

<sup>6</sup> Dow v. Gould & Curry Silver Mining Co., 31 Cal. 629.

the ownership of the stock, without reference to the time when they were earned; consequently the purchaser of a share of stock in a corporation takes the share with all its incidents, one of which is the right to receive all future dividends declared on such shares. And it is immaterial at what times or from what sources such undivided profits have accrued; they are an incident to the share, to which a purchaser becomes at once entitled, provided he remains a member of the corporation until a dividend is made.<sup>1</sup> Thus, in a California case,<sup>2</sup> certain shares of a mining company were assigned, with all dividends to be declared *after* a specified day. Both parties expected a dividend to be declared on that day, but it was not declared until the following day; and it was held that the title to the dividend which accrued *after* the day specified belonged to the assignors. The rule is that in cases of periodical payments due at intervals, and not *de die in diem*, there can be no apportionment.<sup>3</sup>

SEC. 69. **Dividends good as against Creditors, when** — As has previously been stated, the rights of creditors to the assets of a corporation are superior to the rights of a stockholder to a dividend;

<sup>1</sup> March v. Eastern R. R. Co., 43 N. H. 515; Brewster v. Lathrop, 15 Cal. 21; Phelps v. Farmers' & Mechanics' Bank, 26 Conn. 269; Brundage v. Brundage, 60 N. Y. 544; Black v. Homersham, L. R. 4 Exchq. Div. 24; Gifford v. Thompson, 115 Mass. 478; Footo's Case, 22 Pick. (Mass.) 239; Central R. R. Co. v. Papot, 59 Ga. 342; Granger v. Bassett, 98 Mass. 462; Hill v. Newichawanick Co., 48 How. Pr. (N. Y.) 427; Goodwin v. Handy, 57 Me. 143; Jones v. Terre Haute, &c. R. R. Co., 57 N. Y. 196; Boardman v. Lake Shore, &c. R. R. Co., 84 N. Y. 157; Ryan v. Leavenworth, &c. R. R. Co., 21 Kan. 365; Currie v. White, 45 N. Y. 822. Where a dividend is declared by a corporation, it belongs to the holders of the stock at the time of the declaration, without reference to the source from which, or the time during which, the funds divided were acquired by the corporation. Jermain v. Lake Shore, &c. R. R. Co., 91 N. Y. 483; Phelps v. Farmers' &c. Bank, 26 Conn. 269. And the corporation may pay it to the stockholder whose name appears upon the stock-book as owner. Brisbane v. Del., Lack., &c. R. R. Co., 25 Hun (N. Y.), 438. If stock is sold *after* a dividend is declared, but before it

becomes payable, it belongs to the vendor, in the absence of any special contract relating thereto. Spear v. Hart, 3 Robt. (N. Y.) 420; Bright v. Lord, 51 Ind. 272. But in North Carolina it is held that a sale of stock carries with it all dividends declared, but not payable at the time of sale. Burroughs v. N. C. Central R. R. Co., 65 N. C. 376. If stock is sold, but not delivered, the vendor stands as a quasi trustee for the vendee as to all dividends subsequently accruing. Currie v. White, *ante*. Where stock has been fraudulently transferred, upon the ground that the title thereto has not passed, the dividend is payable to the real owner; and if the company pays it to the fraudulent owner it is liable to the true owner, unless the real owner has done some act in reference thereto which justified the corporation in treating such fraudulent owner as entitled thereto. Davis v. Bank of England, 2 Bing. 393; Pollock v. National Bank, 7 N. Y. 274; Cohen v. Gwinn, 4 Md. Ch. 357; Sabin v. Bank of Woodstock, 21 Vt. 353; St. Romes v. Levee Steam Cotton Co., 20 La. An. 381.

<sup>2</sup> Brewster v. Lathrop, 15 Cal. 21.

<sup>3</sup> Clapp v. Astor, 2 Edw. Ch. (N. Y.) 379.

and when a dividend is declared at a time when a corporation is in fact insolvent, creditors may enjoin its payment and compel an application of the money to the payment of their demands. But if at the time when a dividend is declared the corporation is solvent, *and a specific fund is appropriated for its payment*,<sup>1</sup> the fact that it soon afterwards becomes insolvent will not defeat the right of the stockholders to the dividend. Thus, an insurance company declared a dividend out of a clear surplus, and carried it to profit and loss on their books, and ordered checks for the shares of the stockholders to be drawn by its officer upon the bank in which its deposits were kept; and some time after the day when the dividend was payable the company was rendered insolvent by an extensive fire. It was held that the fund in bank was equitably appropriated to the amount of the dividend, and that the stockholders were entitled to it as against the creditors.<sup>2</sup> But, if no specific fund had been set apart for its payment, the rule would have been otherwise.<sup>3</sup>

**Sec. 70. Must be demand, &c.**—An action will not lie against a corporation for a dividend declared, until after a demand for its payment has been made upon the corporation or its authorized agents. Neither will interest accrue, nor the statute of limitations begin to run

<sup>1</sup> *Lamar v. American Fire Ins. Co.*, 6 Paige Ch. (N. Y.) 482. It is not necessary that all outstanding liabilities should be paid off before they are declared, and paid to the respective shareholders. *Green's Brice's Ultra Vires*, 130. But this proposition should at least be taken with this qualification, namely, that the corporation is solvent; for, according to principles of justice in such cases, if the corporation is insolvent, the creditors would have an undoubted right to insist that the profits should first be applied to the satisfaction of their claims. *Scott v. Eagle Fire Ins. Co.*, 7 Paige Ch. (N. Y.) 198; *Karnes v. Rochester, &c. R. Co.*, 4 Abb. Pr. (N. Y.) n. s. 107. In *St. John v. Erie R. R. Co.*, 10 Blatchf. (U. S. C. C.) 271, where a certificate of stock declared that it should be entitled to preferred dividends out of the net earnings, not to exceed a specified note after payment of mortgage interest in full; and after the certificate was issued the corporation borrowed money and issued bonds therefor, with interest, and also took a lease of connecting roads on rent, — it was held that

the certificate was not entitled to be paid a dividend until after the interest on such bonds, and the rent under such leases, had been paid. See also *Thompson v. Erie R. R. Co.*, 42 How. Pr. (N. Y.) 68. And it has been held that the directors may retain the profits and invest the same in improvements; and, in lieu of the dividends which the stockholders would otherwise be entitled to, issue shares of stock where the law or the constating instrument authorized them to increase the capital stock for any purpose. And such action, it has been held, would afford no ground for an injunction to restrain them. *Howell v. Chicago & N. W. R. R. Co.*, 51 Barb. 378; *Atkins v. Albree*, 12 Allen (Mass.), 359; *Minot v. Paine*, 99 Mass. 101; *Boston, &c. R. R. Co. v. Commonwealth*, 100 id. 399; *Deland v. Williams*, 101 id. 571; *Leland v. Hayden*, 102 Mass. 542.

<sup>2</sup> *LeRoy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657.

<sup>3</sup> *Lamar v. American Fire Ins. Co.*, *ante*; *Fawcett v. Laurie*, 1 D. & Sm. 192.

thereon, until demand is made.<sup>1</sup> The bank or party through whom the dividend is payable is the agent of the corporation, and a demand made upon it or him is sufficient.<sup>2</sup>

**SEC. 71. Guaranty of Dividends: Preferred stock.**—An agreement between two corporations, whereby one guarantees the other a certain specified annual dividend on its capital stock, is not a guaranty to its stockholders severally, but to the corporation; and the power to modify the terms of such guaranty is in the directors of such corporations, not in the stockholders. Where such power is fairly exercised by the directors, in view of all the circumstances and in good faith, a court will not interfere, even though on the same facts it might have arrived at a different conclusion.<sup>3</sup> In the case of guaranteed, as in the case of preferred stock, the holders thereof are entitled to be paid their dividends *before* a dividend is paid upon the common stock;<sup>4</sup> and this is so as to arrears of dividends; and a court of equity will restrain the payment of dividends to the holders of the common stock,<sup>5</sup> until the dividends upon such

<sup>1</sup> *State v. Baltimore, &c. R. R. Co.*, 6 Gill (Md.), 363; *Philadelphia, &c. R. R. Co. v. Hickman*, 28 Penn. St. 329.

<sup>2</sup> *King v. Patterson, &c. R. R. Co.*, 29 N. J. L. 504.

<sup>3</sup> *Flagg v. Manhattan Railw. Co.*, 10 Fed. Rep. (U. S. C. C.) 413.

<sup>4</sup> *Thompson v. Erie R. R. Co.*, 11 Abb. Pr. (N. Y.) n. s. 188.

<sup>5</sup> In *Prouty v. Michigan Southern, &c., R. R. Co.*, 1 Hun (N. Y.), 655, in an action to recover arrears of dividends upon preferred stock, and to restrain the defendant from declaring dividends upon the common stock, &c., the referee found that this defendant should be restrained from declaring dividends, or making other disposition of the funds of the corporation, till the amount in arrear and unpaid on the preferred stock should be paid; that a reference should be ordered, to advertise and give notice to other preferred stockholders to come in and prove their claims, &c. This report was confirmed by the court, — DANIELS, J., saying: "This action was brought by the plaintiff, a resident of the State of New York, on his own behalf, and on behalf of others having like grounds of complaint, against the corporate defendant, a railway corporation organized and existing under the laws of the

States of Ohio, Michigan, and Indiana, to secure the payment of dividends, agreed to be paid by such defendant upon certain shares of preferred and guaranteed stock issued by it in the year 1857. By the terms of the certificates issued, it was stated that the stock was "entitled to dividends at the rate of ten per cent per annum, payable semi-annually in New York, on the first days of June and December in each year, out of the net earnings of said company," and was "also entitled to share *pro rata* with the other stock of the company, in any excess of earnings over ten per cent per annum; and the payment of dividends as aforesaid" was thereby guaranteed. The ten-per-cent dividends upon the stock were not paid from the time when it was issued until on or about the 1st day of July, 1863. And neither then, nor at any time since, was any payment made of the dividends in arrear. The object of this action was the recovery of those arrears, and the judgment has provided for that, by requiring the net earnings of the company to be applied to their payment. It was urged upon the trial, and the objection was again taken on the argument of this appeal, that the court had no jurisdiction over the cause of action presented by the complaint, because the rail-



guaranteed or preferred stock are paid; and it seems that the fact that the corporation sought to be restrained has its domicile in

road company was a corporation formed and existing under the laws of other States, and the other defendants proceeded against were its directors. Numerous adjudged authorities were referred to, in support of, as well as against, the objection, most of which it will be unnecessary to consider. For neither of them, when properly limited, directly sustains or defeats it. The jurisdiction of this court over actions against corporations created under the laws of other States and countries, has been defined and declared in very plain terms by statute; and it cannot be necessary to look very much beyond them, in order to ascertain and determine the design of the legislature in its enactment. By that statute it has been provided, and the provision has been in force during the entire pendency of this action, that an action may be maintained in this and certain other courts by a resident of this State, against a corporation created by or under the laws of any other State, government, or country, *for any cause of action*. Code, § 427. This is a broad and unqualified provision, containing nothing justifying the restriction placed upon it by the Special Term, in deciding the case of *Howell v. Chicago & Northwestern Railway Co.*, 51 Barb. (N. Y.) 378. And that must have been afterward the conviction of the learned judge who decided that case, for it was at a court held by himself that the order was made in this cause, directing that judgment should be entered upon the report made by the referee. If that was not so, then this case is so far distinguishable in its facts from that, as to render the decision then made inapplicable to the objection now urged against the jurisdiction of the court. The case of *Whitehead v. Buffalo & Lake Huron R. R. Co.*, 18 How. Pr. (N. Y.) 218, has no bearing upon the point presented, because the plaintiff in it was not a resident of this State, and his right to maintain his action, depended upon the other provisions contained in the section. The language used by the legislature is full and explicit; and, like all other statutes, should be construed according to the fair import of its terms,

in order to carry into effect the object of its enactment. *McCloskey v. Cromwell*, 11 N. Y. 593, 601, 602. And as so construed, it includes the present action. It is further objected, in support of the appeal taken from the judgment, that the stock upon which the dividends are claimed was issued without authority. The corporation issuing it was formed by the consolidation of two pre-existing corporations, operating a continuous line of railroad from Toledo, in the State of Ohio, to Chicago, in the State of Illinois, known as the Michigan Southern, and Northern Indiana Railroad Companies. Before the consolidation, by section 20 of an act of the legislature of the State of Indiana, approved May 11, 1852, it was provided that, "for the purpose of providing means for the payment of its debts, and for the construction of its road, materials, or equipments, such company may issue a preferred stock to an amount not exceeding one-half of the amount of its capital, with such priority over the remaining stock of such company, in the payment of dividends, as the directors of such company may determine, and shall be approved by a majority of the stockholders." And this provision was applicable to the Northern Indiana Railroad Company, one of the constituents of the consolidation. By another act, passed by the legislature of the State of Michigan, approved March 28, 1850, and applicable to the Michigan Southern Railroad Company, it was enacted, by sections 3 and 4, that the company, for the purpose of providing means for the payment of its debts, and for the construction, extension, and completion of its railroads, shops, depots, buildings, and equipments, might "create and issue shares of guaranteed stock, to be denominated 'construction stock,' to such an amount as it may determine, not (with the original stock) to exceed the amount of their capital stock allowed by law, which construction stock shall be entitled to such dividends, and payable at such place, and in such manner, and with such preference over the remaining stock of said company in the payment of dividends, as the directors of

another State, will not defeat the jurisdiction of the court.<sup>1</sup> A guaranty of dividends upon stock by a corporation must always be

said company may determine, and as shall be approved by the holders of a majority of the stock represented at their annual meeting." Section 5 of an act passed by the legislature of the State of Ohio, approved March 3, 1851, conferred general and unrestricted authority on the Northern Indiana Railroad Company, created by its provisions, to consolidate with any railroad company then or afterward formed or incorporated in the States of Michigan or Indiana, under any name mutually agreed upon, from which time it was to become a portion of such company. And by section 2 of an act of the legislature of Illinois, approved February 28, 1854, which was before the consolidation was effected, it was provided that any intersecting railroad companies, having continuous lines, should be authorized to consolidate their property and stock with each other, and by the name agreed upon, should "be a body corporate and politic," with "all the powers, franchises and immunities, which the said respective companies shall have, by virtue of their respective charters, before such consolidation." The act of the legislature of the State of Indiana, approved February 23, 1853, allowing railroad companies of that State to "intersect, join, and unite their railroad with any other railroad, constructed or in process of construction," in that "or in any adjoining State, at such point on the State line, or at any other point mutually agreed upon," was equally as full and unrestricted. For it provided that it might be done, and the companies consolidated, "upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining State, with whose road or roads, connections are thus formed; provided their charters authorized said railroad to go to the State line, or to such point of intersection." By section 50 of an act of the legislature of the State of Michigan, approved February 13, 1855, which was also before

the consolidation, it was still further provided, that any railroad company in that State, having a continuous or connected line with any other railroad company, might consolidate with such company, either in or out of that State, into a single corporation; and that "such new corporation shall possess all the powers, rights, and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions, and perform all the duties, imposed by the provisions of their respective charters, or laws of organization," not inconsistent with the provisions of that act. And by another act, enacted and approved at the same time, by which the particular consolidation of the Michigan Southern, and Northern Indiana Railroad Companies was explicitly authorized, it was provided that "all the franchises, property, powers, and privileges," then "enjoyed by the Michigan Southern Railroad Company, and all the restrictions, liabilities, and obligations imposed upon said two corporations by virtue of their respective charters, and all contracts by and with either or both of said corporations, shall appertain to said united corporation, in the same manner as if the same had been contained in, or acquired under, an original charter, or made by or with said consolidated corporation." Under and pursuant to these various provisions, an agreement was entered into by the different companies for their consolidation into one corporation, on the 25th of April, 1855, with the consent of their respective stockholders. And, by the agreement then made, it was provided and agreed that "all and singular their several and respective franchises, privileges, and immunities" should henceforth "be the estates, property, and effects, franchises, privileges, and immunities of" the "consolidated company, to all intents and purposes;" and that it should "have all the powers, franchises, immunities, property

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<sup>1</sup> But see *Williston v. Michigan Southern, &c. R. R. Co.*, 13 Allen (Mass.), 400; *Chase v. Vanderbilt*, 62 N. Y. 307.

understood as a mere contract to pay dividends *if they are earned*; because a contract to pay *at all events* would be *ultra vires*, and

and privileges" enjoyed by the said parties of the first part, or the said parties of the second part," which included the constituent companies, "or which either of the said respective companies of the said first and second parts have, or had, by virtue of their respective charters," before the execution of such agreement. Under these statutory provisions, and the stipulations contained in the agreement made by the consolidating companies, there seems to be no room whatever for doubting the power of the new corporation to issue preferred and guaranteed stock, provided it was done with the consent of its stockholders, and it did not exceed the prescribed limits of the capital of the consolidated corporation. The power was fairly given to the constituent corporations, both by the laws of Indiana and Michigan. For no essential difference can exist between preferred stock, having priority over the remaining stock in the payment of dividends, and stock to which that preference may be guaranteed. In the one case, the agreement to preserve the preference and pay the dividend before dividends may be paid on the common stock, is to be clearly implied, while in the other it is explicitly expressed. The obligation is substantially the same in each instance. And for that reason there was no practical difference in this respect in the authority conferred upon either corporation, concerning the right to issue such stock. The admitted, as well as undenied, allegations of the complaint showed that the capital of the consolidated corporation was fixed at the sum of \$12,000,000, of which \$3,000,000 remained unissued when the preferred and guaranteed stock was provided for and issued. This stock did not exceed that amount, and its issue was unanimously provided for and authorized by the stockholders, at their regular annual meeting in April, 1857, and by the action of the board of directors. This action was made the subject of some criticism by the defendants' counsel, because it was taken to carry into effect the resolution adopted on the subject by the stockholders. But it is

not justly subject to question; for, in any view which may be taken of it, the board did provide for and sanction the creation and sale of this stock, precisely in the form in which it was offered to the company's stockholders. The latter were the only persons who could by any possibility be injuriously affected by it, because it postponed their right to dividends, until the stipulated ten per cent should be paid out of the net earnings of the company on the new stock, under the guaranteed preference given to it, when they unanimously consented to relinquish their right to dividends until the stipulated ten per cent per annum should be paid upon the new stock. That would seem to be sufficient to remove all objection to its validity, even if it had not been specially authorized by the statutes referred to, and the agreement made for the consolidation, as long as the company, at the time, possessed the power to issue stock to the additional extent of \$3,000,000. What its form should be, could only be important to the owners of the preceding stock, and when they waived their right to dividends in its favor, no ground for complaint could exist in favor of other persons, or of the corporation issuing the stock. The provisions of the statutes requiring the dividends to be equally distributed among the stockholders of the company, in no way affect the validity of the guaranteed stock; they were made to secure the observance of the ordinary rights of the stockholders; and it was contemplated that such rights might be surrendered by them, in the provisions made for preferred and guaranteed stock, which were rendered dependent on the assent of a majority of the ordinary stockholders. Their rights were subject to this qualification, and they unanimously accepted it in favor of the stock afterward issued." Upon the question as to whether there was a binding and paramount obligation to make them, when the earnings necessary for that purpose should afterward be realized, the court added: "A somewhat similar point was presented for the construction of an act of Parliament providing for preferred stock, in the case

void.<sup>1</sup> In reality, "guaranteed" and "preferred stock" stand upon the same footing, and are not entitled to a dividend unless it has been earned.<sup>2</sup>

of *Henry v. Great Northern Railway Co.*, 3 Jur. (N. S.) 1133. There was no obligation to make payment of the stipulated dividends at any particular time, in that case, beyond what might be inferred from the undertaking that they should constitute a particularly specified sum per year. It could reasonably be inferred from that circumstance that the obligation at least existed to make the dividends annually. For that was the apparent purpose of the defendant, according to the form and import of the stock issued. But the court held that the stockholder was not deprived of his right to dividends because the earnings, out of which they were expected to be made, were not realized dur-

ing the year in which, by the terms of the stock issued, they ought to have been paid. On the contrary, the stock was held to be "a charge on all accruing profits, at the stipulated rate, before anything is divided among the ordinary shareholders. This is, substantially, interest chargeable exclusively on profits." 3 Jur. (N. S.) 1137; 1 De Gex & Jones, 606, 637. A similar conclusion was maintained in *Taft v. The Hartford, Providence, & Fishkill R. R. Co.*, 8 Rhode Island, 310, where the action failed, because no net earnings had been received. See also *Crawford v. North Eastern Railway Co.*, 3 Jur. (N. S.) 1093; *Stevens v. South Devon Railway Co.*, 9 Hare, 313. From

<sup>1</sup> *Lockhart v. Van Alstyne*, 31 Mich. 76; *Pittsburgh, &c. R. R. Co. v. Allegheny Co.*, 63 Penn. St. 126. In *Williston v. Michigan Southern, &c. R. R. Co.*, 13 Allen (Mass.), 400, the stock-certificate contained a provision as follows: "Said stock is entitled to dividends at the rate of ten per cent per annum, payable semi-annually in New York on the first days of June and December in each year, out of the net earnings of said company, and is also entitled to share *pro rata* with the other stock of the company in any excess of earnings over ten per cent per annum, and the payment of dividends as aforesaid is hereby guaranteed;" and it was held that the holder of the certificate could not maintain an action at law against the corporation for a failure to declare and pay dividends as provided in the certificate. An indorsement on certificates of preferred shares in a corporation issued by order of the directors, "five-per-cent semi-annual dividend guaranteed from Sept. 1, 1872," signed by the treasurer, is not to be construed as a guaranty that the corporation will pay dividends at all events, but only as a guaranty to pay dividends to the holders of the certificates in preference to others, when the earnings of the corporation will warrant it. "Dividend," in the common understanding of the term, when

applied to something to be paid by corporations not insolvent or in contemplation of dissolution, means a sum which the corporation sets apart from its profits to be divided among its members; and so the words must be understood in such a guaranty. The holder of such preferred stock is not entitled to recover back, as money received to his use, the money paid to the company for the stock, on the ground of want of authority in the directors, without the previous assent of the stockholders, to issue such certificates, where it appears that such stock has been distinctly recognized at the meetings of the corporation without any question of its validity having been raised. *Lockhart v. Van Alstyne*, 31 Mich. 76. The guaranty of a dividend by a corporation means nothing more than a pledge of the funds legally applicable to the purposes of a dividend; and if, in any case, it appear that the dividends have not been earned, the holders of the stock upon which a dividend is guaranteed cannot recover in a suit to enforce payment of such dividend. *Taft v. Hartford, &c. R. R. Co.*, 8 R. I. 310.

<sup>2</sup> *Taft v. Hartford, &c. R. R. Co.*, 8 R. I. 335; *In re Bristol, &c. Railway Co.*, L. R. 6 Eq. 448; *Lockhart v. Van Alstyne*, 31 Mich. 76.

**SEC. 72. Stock Dividends.** — Where a corporation has a surplus of earnings over its debts and capital, which are properly applicable

these and other authorities, a recent text-writer deduces the principle, that, "unless there is some agreement to the contrary, preference shareholders are entitled to be paid their dividends to the amount guaranteed, before the other shareholders receive anything; so that if the profits divisible at a given time are not sufficient to pay the guaranteed dividends in full, the deficiency must be made good out of the next divisible profits, the ordinary shareholders taking nothing until all arrears of guaranteed dividends have been paid to the preference shareholders. 1 Lindley on Part. (2d ed.) 781. The principle is certainly warranted by the terms used in creating and selling the stock, and it sustains what must have been, at the time, the reasonable expectations of both the parties. It is right and just, and ought to be maintained in the application made of it by the learned referee in the present case. No reason exists for the objection that the plaintiff has deprived himself of his right to have the net earnings applied to his payment of the dividends claimed in this action, by the acquiescence in their distribution among the general stockholders. For it appears by his own evidence, and is not contradicted by the defendants' witnesses, but found to be true by the referee, that the plaintiff protested against that disposition of the net earnings of the company, and demanded his dividends on his guaranteed stock. That, he stated, he was very particular to make each time. When the action was commenced, the corporation existed precisely the same as it had done from the time when the consolidation was effected, in the year 1855. It was alleged that a further consolidation was contemplated, but it did not appear to have been consummated by anything shown in the case, until after the referee had made his report. For that reason, the proceedings up to that time cannot be deemed unwarranted by another consolidation, even if one actually took place before the report was in fact made. Up to that time, no evidence of its existence was given in the action.

The action was professedly brought by the plaintiff on his own behalf, and on that of the other owners of the preferred and guaranteed stock having similar grounds of complaint. This was the proper form to be adopted, under the circumstances constituting the cause of it. The case of *Williston v. The Michigan Southern & Northern Indiana R. R. Co.*, 13 Allen (Mass.), 400, failed because an action at law could not be maintained, and for the further reason that the courts of that State had no jurisdiction of an action against the defendant, in the present form, because it was a foreign corporation. And the same conclusion was declared, as to the impropriety of an action at law, in *Chase v. Vanderbilt*, by the Superior Court; but that such an action as the present one was proper, was conceded in the disposition which was made of *Williston's* case. The actions referred to in the English courts were also brought in this form, and apparently assumed as free from objection in that respect. The same thing is maintained by Story's *Eq. Pleading*, 7th ed., §§ 94-103; also by *McKenzie v. L'Amoureux*, 11 Barb. (N. Y.) 516; *Bouton v. City of Brooklyn*, 15 Barb. (N. Y.) 375; *Hammond v. Hudson River Iron & M. Co.*, 20 Barb. (N. Y.) 378; and *Cady v. Conger*, 19 N. Y. 256. And the relief awarded by the report is substantially the same as was decreed in *Henry v. Great Northern Railway Co.*, *supra*. So far as the other owners of the guaranteed stock are concerned, the relief awarded precisely conforms to the settled practice of courts of equity. The rule in these courts is, that "the other creditors may come in under the decree and prove their debts before the master (now the referee) to whom the cause is referred, and obtain satisfaction of their demands, equally with the plaintiff in the suit, and under such circumstances they are treated as parties to the suit." Story's *Eq. Plead.* (*supra*) § 99, page 104; *Hallett v. Hallett*, 2 Paige Ch. (N. Y.) 15, 19. The decision made in *Kilbourne v. Allyn*, by the General Term of the third department, is not in conflict with this

to the payment of a cash dividend, it may, *where it has the power to increase its stock*, declare a dividend of stock, and retain the money

practice, or the right, in a proper case, to maintain such an action. For the facts did not bring the case within the law relating to this class of actions. And if they had, the disposition made of it was entirely improper, for the relief had been awarded to other persons without bringing them in under the judgment, and without any opportunity being afforded to them, or any desire being indicated by them, to become parties to the action, or to avail themselves of the benefit of the judgment recovered. The objection that the stockholders should have been made parties to the action, appears to be untenable. *Thompson v. Erie Railway Co.*, 45 N. Y. 468. No good reason seems to exist, for denying the plaintiff interest on the dividends he was entitled to receive, from the time the net earnings were appropriated to the holders of the common stock by the corporation. The earnings should have been first appropriated to the dividends on the guaranteed stock. That would have given its holders the indemnity for the loss for which they are now to be compensated by interest. And they are entitled to interest for that purpose. *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Dana v. Fiedler*, 12 N. Y. 41. The judgment authorized by the report will simply restrain the further misappropriation of the dividends to the common stock, until the arrears, with interest on the guaranteed stock, shall be paid out of the net earnings of the company. And, in that respect, it will be as favorable to the defendants as they had any reason to require that it should be. Nothing less than what has been directed would provide the owners of the guaranteed stock with the relief they were entitled to have awarded. The order made after the referee's report, substituting the Lake Shore and Southern Michigan Railroad Company as the defendant, had no effect on the plaintiff's right to proceed with the action against the present defendants; for, before judgment was entered, it was reversed upon appeal, and that as effectually removed it from the case as though it never had in fact been made. After the

reversal of that order an application was made, upon the same and other papers, for leave to enter judgment upon the report of the referee, and to have a further reference to bring in other parties in interest. The order was made, allowing judgment to be entered, and directing the reference applied for. From the plaintiff's own papers, however, it was shown that the Michigan Southern and Northern Indiana Railroad Company had previously consolidated with the Lake Shore, and Buffalo and Erie Railroad Companies. This, it was stated and shown by the plaintiff, was done pursuant to laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana, and Illinois. But what those provisions were was not in fact shown, beyond those contained in the laws of this State, which, however, have no application to the obligations forming the plaintiff's cause of action in the present case. It must be assumed that the consolidation mentioned was lawfully effected, for that is stated to be the fact in the plaintiff's papers; and from them, it appears that the preceding corporations have merged in, and formed, one single corporation, owning and operating a line of railroad from Buffalo to Chicago. By this merger, the preceding corporations ceased to exist, according to the papers now before the court, on the appeal taken from the order; and all their property, franchises, rights and privileges, have become vested in the new corporation, formed by the final consolidation. Although all the rights of creditors, and liens upon the property of either of the corporations, were, by the terms of the consolidations, preserved unimpaired, that gave the plaintiff no power to proceed against either of the constituent corporations; for he is not a creditor, and had no lien upon the property of the corporation, within the meaning of these terms. They related to specific liens upon tangible property, and not mere equities, in the nature of charges upon earnings, like those existing in the plaintiff's favor. These were otherwise provided for, by the stipulation that all just debts, guaranties, lia-

for permanent improvements, etc.<sup>1</sup> Or it may issue new stock, giving the stockholders the privilege of taking it at par or less than

bilities, and obligations, existing against either corporation at the time of the consolidation, should be assumed, provided for, paid and discharged by the consolidated company; and that all contracts and agreements between either of the companies and any person or persons should be carried out by the new company. The changes made appear to have been sanctioned by the votes of the requisite number of stockholders, and to have been entirely lawful and proper; and they necessarily ended the existence of the constituent corporations, and the plaintiff's right to proceed to judgment against the one sued by him. In order to avoid this result, the statutes themselves have been referred to, upon the present appeal from the order. But, notwithstanding the very general provision of the Code, prescribing the proof of the laws of other States, they cannot be considered by the court, because they were not read on the hearing, when the application for the order was made. If they provide for the continued existence of the old corporation, for the purpose of securing satisfaction of the demands against it, they should have been read, or otherwise brought to the notice of the court, when that application was heard. They cannot, for the first time, be read upon the hearing of an appeal from the order, which their provisions might have justified, if they had there been made to appear. A different rule was suggested as proper, in the case of *Cutler v. Wright*, 22 N. Y. 472, 474. But it was not afterward approved or followed. On the contrary, it was held in *Hunt v. Johnson*, 44 N. Y. 27, that the laws of other States could not, for the first time, be read upon the hearing of an appeal. They are required to be produced before the court entertaining the original application. The consequence is, that no authority for proceeding in the case against the preceding corporation, appears before the court. For that reason, as the corporation issuing the stock has ceased to exist, by merger in a new corporation, which has assumed all the obligations of its predecessors, the future proceedings

should have been against the consolidated company. The order made on the application for leave to enter judgment, and for a reference under the judgment, was unauthorized, and it, as well as the judgment entered in pursuance of it, should be reversed, with costs. But, as the proofs made of the consolidation simply affected the plaintiff's right to the order itself, and the proceedings had under it, the preceding proceedings in the action cannot be affected or disturbed by such reversal. An order should also be entered, denying the motion, but without prejudice to a renewal of it, upon further papers showing the continuance of the corporation, if that can be done, for the purposes of the action."

<sup>1</sup> *Boston & Lowell R. R. Co. v. Com.*, 100 Mass. 393; *Howell v. Chicago, &c. R. R. Co.*, 51 Barb. (N. Y.) 378; *State v. Baltimore, &c. R. R. Co.*, 6 Gill (Md.), 363; *Miller v. Illinois Central R. R. Co.*, 24 Barb. (N. Y.) 312. In England the rule seems to be that it is *ultra vires* for a corporation to expend its profits in any manner except in dividends. Thus, a railway company had power to raise additional capital by the issue of shares, and to allot to them a preferential dividend, it being enacted that dividends should not be paid out of any moneys received for the shares, and that no shares should be issued until one-fifth of the amount had been paid. The revenue of the company during a particular half-year was sufficient to pay a dividend, after providing for all charges properly payable out of revenue, but, owing to the refusal of creditors of the company to give time, the revenue was absorbed in payment of sums properly chargeable to capital. Under these circumstances, the company in general meeting sanctioned a plan for offering to each shareholder, at par, preference shares to an amount equal to the dividend which would have been payable to him if the revenue had not been diverted for capital purposes. These shares were salable, but only at a considerable discount. A shareholder filed his bill, on behalf of himself and the section of shareholders to which he belonged,

par, although the stock so issued is worth much more than par.<sup>1</sup> Indeed, whether a stock dividend is declared or not, it has been held that in case of an increase of stock, the stockholders have the first right to take the stock, in proportion to the amount held by them.<sup>2</sup> But however this may be as to banks, and corporations of that class, it is not believed that the rule has any force as to railroads, and other corporations which exist independently of their stockholders, and whose powers are mainly defined by statute.<sup>3</sup> And in any event the rule applies only to new, and not to re-issues of stock,<sup>4</sup> and may be waived.<sup>5</sup>

to restrain the issue of shares for the above purpose, to have those already issued cancelled, and to restrain the payment of dividends on them. It was held that the scheme was *ultra vires*, for, assuming that the shares could lawfully be issued at a discount (an issue under this scheme being in reality an issue at a discount), and assuming that, owing to the diversion of the revenue to capital purposes, they could lawfully be treated as assets for payment of a dividend, each shareholder who was not willing to accept an allotment of them in specie had a right to insist that the proceeds of the whole should be applied ratably in payment of a dividend to all the shareholders. *Hoole v. Great Western R. Co.*, L. R. 3 Ch. App. 262. Under a statute authorizing a bank to retain a certain share of the "dividends" upon the stock owned by the State, towards certain unpaid stock of the State, it was held that a portion of the capital stock, divided among the stockholders, was not dividends within the act. *Attorney-General v. State Bank*, 1 D. & B. (N. C.) Eq. 545. A corporation, restricted to six-per-cent dividends out of profits to stockholders, issued, on the basis of an increased business and enhanced value of their works and property, in accordance with a resolution of stockholders, scrip-certificates from time to time, entitling the holder to additional shares of stock, distributing then ratably among share and scrip holders in proportion to the amount held at the date of the issue. The resolution, embodied in the scrip, provided that the scrip should not be entitled to any *cash dividend*, until the funded debt of the company should be paid off, or adequate provision made for

its discharge when due, and payment demanded; nor until the conversion of said scrip into stock. After such conversion certain of the scripholders demanded by bill in equity the back dividends which had been declared on the stock from the issue to the date of conversion. It was held, 1. That the rights of the scripholders were measured by the contract under which the scrip was issued, and of which the scrip alone was the evidence; 2. That the contract being but an engagement that the holders of the scrip might become shareholders after payment of the funded debt, or provision made therefor, the scripholders were, therefore, not entitled to dividends upon the scrip or upon the stock into which it had been converted, except on such as had been declared subsequently to said conversion. *Brown v. Lehigh Coal and Navigation Co.*, 49 Penn. St. 270.

<sup>1</sup> *Moss's Appeal*, 83 Penn. St. 265; *Wiltbank's Appeal*, 64 id. 256.

<sup>2</sup> *Wheeler's Case*, 2 Abb. Pr. (N. Y.) n. s. 361; *Gray v. Portland Bank*, 3 Mass. 364.

<sup>3</sup> *Miller v. Illinois Central R. R. Co.*, 24 Barb. (N. Y.) 312; *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294; *Curry v. Scott*, 54 Penn. St. 270.

<sup>4</sup> *Page v. Smith*, 48 Vt. 266. If the corporation uses its surplus to buy up some of its own stock, the stockholders have no right to claim this *pro rata*, until it is ordered to be divided among them. *Coleman v. Columbia Oil Co.*, 51 Penn. St. 74; *Wiltbank's Appeal*, 64 id. 256; *St. John v. Erie R. R. Co.*, 10 Blatchf. (U. S. C. C.) 271; *Bradley v. Holdsworth*, 3 M. & W. 422.

<sup>5</sup> *Eidman v. Bowman*, 58 Ill. 444.



**SEC. 73. Income on Stock in Trust.** — If shares of the capital stock of a corporation are held as a fund in trust to pay the income to a person until his death, and then convey the capital to another, the regular dividends declared and paid would of course constitute income to which the trustee, for the benefit of the *cestui que trust*, would be entitled; and also any dividends on shares of additional stock distributed as part of the net earnings of the corporation. But he would not be authorized to treat the additional stock itself as income, for the benefit of his *cestui que trust*.<sup>1</sup> A fund bequeathed in trust to pay the income to one until his death, and then the capital to another, included shares in the stock of a railroad corporation. This corporation, out of its net earnings accumulated during the term of the trust, bought in the market part of its own stock, invested other earnings to an amount equal to twenty per cent of the par value of the residue of its stock in property, a large portion of which was not required for the use and improvement of the railroad, and voted to create a number of new shares of the same par

<sup>1</sup> *Minot v. Paine*, 99 Mass. 101. In *Brundage v. Brundage*, 60 N. Y. 544, a testator bequeathed to legatees a specified number of shares of the stock of a corporation. After the execution of the will, and before the testator's death, the corporation issued to its stockholders certain "interest certificates," stated to be for moneys expended out of its earnings in improvements. By their terms, these certificates were made assignable, and payable, at the option of the company, out of future earnings, with dividends thereon, or convertible into stock. The testator received and retained these certificates on the shares held by him, and also the dividends declared thereon, and held the certificates at the time of his death. It was held that the legatees took the specified number of shares of stock as they were at the time of the testator's death, and could claim no right to, or interest in, the certificates. And it was also held that the question of the validity or invalidity of the certificates, and its effect upon the value of the stock, could not be considered in such an action. If the certificates were invalid, the stock was unaffected thereby; if valid, having been issued to and received by the testator, they became an independent part of his estate, and the subject of

a separate and independent testamentary disposition. And whether considered as dividends or not, the certificates did not become attached to the shares of stock. If dividends, they belonged to the stockholder owning the shares upon which they were paid; paid, to be sure, as something growing out of his stock, but instantly, when paid, separable from and independent of it, as much so as though paid in money, and appearing in his assets as a deposit to his credit in his bank account. If not dividends, but an optional agreement to pay the amount expressed, or to convert into other shares of stock, then by their terms they were transferable by the holder, and by their terms, and by the necessary legal effect of them, an independent thing of value, not a part of the stock, nor in any ways attached thereto, or accompanying it. In either view, a person becoming a holder of the stock subsequent to the issue of the certificates to a prior holder of the stock, acquired no right or interest in them. Neither were the rights of the parties affected by the fact that the certificates were payable at the option of the company out of future earnings, as they represented past earnings of the road used to increase its value, and as they were, by their terms, assignable.

value, to be issued and disposed of as the directors should deem proper. The directors then voted to offer to the individual stockholders the right to take part of the new stock at par, in the proportion of twenty per cent of new shares for each old share held by the taker, and that if any individual stockholder should not avail himself of his right in this respect, they would dispose of it as they might see fit; and at the same time they declared a dividend of forty per cent on the old shares held by the individual stockholders, payable, "twenty per cent in the shares of the company which were purchased and held by this corporation in its corporate capacity, and twenty per cent in cash, derivable from the shares which the stockholders entitled to this dividend shall respectively pay for the new stock taken by them, under the terms of the preceding vote." On these facts the question presented to the court was, what part of the avails of the stock was income to which the tenant for life was entitled, and what part, if any, belonged to the trust fund. The court held that, of the avails of the dividend to the trustee, so much as was derived from the first twenty per cent was payable as income to the life tenant, and so much as was derived from the second twenty per cent accrued to the capital of the trust fund.<sup>1</sup>

<sup>1</sup> *Leland v. Hayden*, 102 Mass. 542. See also *Wiltbank's Appeal*, 64 Penn. St. 256. As the corporation is the legal owner of the property, and has power, within the limits of its charter, to give to the shareholders either an increase of income or an increase of capital out of the money in its hands, according to the discretion of its directors, it would seem to follow that an increase of capital should be kept for the remainderman, and an increase of income should be paid to the tenant for life. This rule appears to be in conformity with the intention of the testator who gives personal property in this manner. He is held to have the interest of the successive takers equally in view. *Minot v. Paine*, *ante*. A corporation, having reserved profits to an amount exceeding twenty per cent of its capital, and having authority to create additional stock, declared a dividend of twenty per cent on its existing shares, payable in six years to their then holders, either in money or stock, at the option of the corporation, interest thereon to be paid meanwhile on

a certain day each year to the holders on that day. After declaring this dividend, it created new stock of the same par value as its former shares; but the market value of the old shares, to which the privilege of the dividend was thus attached, was twenty per cent more than that of the new shares, and the difference was owing wholly to this privilege. It was held that, in computing the true value of the corporate franchise, for the purposes of taxation, the tax commissioner might properly estimate the fair cash valuation of all the shares of the capital stock by adding the actual market value of the old shares to that of the new shares, without making any deduction on account of the dividend. *Boston, &c. R. R. Co. v. Commonwealth*, 100 Mass. 399. The compensation paid to a corporation for part of its real estate taken by right of eminent domain, and distributed as a dividend to the shareholders, was held to belong to the capital and not the income of a trust fund invested in the shares. *Heard v. Eldredge*, 109 Mass. 258. Extraordinary dividends belong to

**SEC. 74. Money in hands of Directors.**—Money in the hands of the directors may be income to the corporation, but it cannot be considered income to the subscribers until a dividend is made. Thus, where the company invests in machinery, or in railroad tracks, depots, rolling stock, or any other permanent improvement for enlarging or carrying on their legitimate business, it does not become income to the shareholders, but is accretion to the capital; and it is the same whether they increase the shares or the par value of the shares, or leave the shares unaltered. And if the number of shares is increased for purposes merely speculative, it is an increase of capital stock and not of income, and it has been suggested that it would be practically unwise for courts to go behind the action of the company and attempt to ascertain how they came by the funds out of which they declare either their cash or their stock dividends.<sup>1</sup>

The right to take new shares on increase of the capital stock is a benefit or interest which attaches to the stock, and is not usually considered as income derived from the prosecution of the corporate business, but inherent in the shares; and it is important to understand this principle, as we have seen in cases where stock is left in trust to pay the income for life to one person, with remainder of the principal to another.<sup>2</sup> If a stock dividend under such circumstances is declared, the trustee would take it as capital for the remainderman, and not as income for the benefit of the life estate

the person holding a life interest in the stock upon which such dividends are earned. *Woodruff's Estate*, 1 Tuck. (N. Y.) 58. A bank, duly authorized, reduced the par value of its shares, in consequence of certain supposed losses. Upon the recovery of the sums supposed to have been lost, it issued additional stock to its shareholders. It was held that a legatee having a right for life to the income of certain shares under a will approved prior to these changes, was not entitled to an unconditional certificate of the new dividend stock. *Parker v. Mason*, 8 R. I. 427. The courts will not presume that an increase of stock authorized by law is a stock dividend. Whether the increase is real or a pretence is a question of fact for the jury. *Commonwealth v. Erie, &c. R. R. Co.*, 74 Pa. St. 94. While negotiations were pending between two gas companies for their consolidation, upon a certain basis of indebtedness, one of the companies passed a

resolution, without the knowledge of the other, declaring a scrip dividend of ten per cent on the amount of their capital stock, with interest, payable at the option of the company, thus increasing their indebtedness to that amount; and certificates of indebtedness were issued in accordance with the resolution. The consolidation of the companies was completed without any knowledge of the other company as to such resolution and such increased indebtedness. It was held, upon a bill in equity filed for that purpose, that the scrip issued in payment of such dividend should be declared void, and the company issuing it restrained from recognizing the scrip as a valid obligation, and from permitting its transfer. *Bailey v. Citizens' Gas Co.*, 27 N. J. Eq. 196.

<sup>1</sup> *Boston, &c. R. R. Co. v. Commonwealth*, 100 Mass. 399.

<sup>2</sup> *Atkins v. Albree*, 12 Allen (Mass.), 359.

although it is the result of the net earnings of the corporation.<sup>1</sup> But in Pennsylvania<sup>2</sup> this doctrine is repudiated, and in a late case,<sup>3</sup> where the question arose as to the *status* of a dividend made

<sup>1</sup> *Minot v. Paine*, 99 Mass. 101. See also *Deland v. Williams*, 101 id. 571; *Leland v. Hayden*, 102 id. 542; *Heard v. Eldredge*, 109 id. 258; *Rand v. Hubbell*, 115 id. 461; *Gifford v. Thompson*, id. 478.

<sup>2</sup> *Vinton's Appeal*, 99 Penn. St. 434; 44 Am. Rep. 116; *Earp's Appeal*, 28 id. 368; *Wiltbank's Appeal*, 64 id. 25.

<sup>3</sup> *Vinton's Appeal*, *ante*. GORDON, J., said: "The court below having ascertained beyond doubt that the money in controversy was derived, not from the annual earnings or accumulations of the St. Louis Gas Company, but from a sale of part of its franchise and permanent property, thought it ought of right to belong to the *corpus* of the trust estate, and thereupon refused to award it to the life tenant. If we are to follow our own decisions as found in *Earp's Appeal*, 28 Penn. St. 368; *Pennsylvania Co. v. Dovey*, 64 id. 260; *Moss's Appeal*, 64 Penn. St. 254; s. c. 24 Am. Rep. 164; and *Biddle's Appeal*, 99 Penn. St. 278, the opinion in which was delivered by Mr. Justice MERCUR, but a few days ago, we must affirm this conclusion. All these cases are similar to the one in hand, — a gift of the income of stocks for life to one person, and the *corpus* over to another, — and by all these we are instructed that in order to ascertain and settle the rights of these parties, we must endeavor to discover what is principal, or capital, as distinguished from earnings or dividends resulting from the use of capital. More than this: following these authorities, we must go even farther, and capitalize, in favor of the remainderman, the surplus profits which may have accumulated in the treasury of the corporation, prior to the date of the creation of the trust. The present case, however, does not carry us to this extent, for the money in controversy comes from a sale of a part of the original franchise and property of the gas company; in fact, part of the very *corpus* represented by the stock shares which form the principal of the trust created by the deed of James Martin. The charter of this company clothed it with powers and

privileges not only very extensive, but very valuable. By this charter it had 'the sole and exclusive privilege of vending gas lights and gas fittings in the city of St. Louis and its suburbs,' and it was also empowered to 'lay pipes, conduits, etc., in any of the roads and avenues of the suburbs, and in any of the streets and alleys of the city;' also, by indenture of the 8th of January, 1841, between the city and the company, the sole and exclusive privilege of lighting the streets, alleys, wharves, public buildings, and other public places, of the city of St. Louis, and of providing and furnishing the fittings and materials of all kinds, necessary for that purpose. The result of these grants, and a careful use of them, was great prosperity to the company, and a corresponding rise in its stock. But this very prosperity begot opposition and danger. The city refused to abide by its contract, and to pay up its dues. Another company sprang up, the Laclede, which disputed the exclusive right of the old company to the territory mentioned in its charter. This led to the tripartite agreement of February 8, 1873, between the city of St. Louis, the Laclede Gas Company, and the St. Louis Gas Company, by which, among other things, the latter company agreed to withdraw from about one third or one half of its former territory in favor of the Laclede, and also to sell to it all its mains, pipes, connections, lamps, lamp-posts, brackets, meters, and all other of its property and effects situated and being within the territory from which it had agreed to withdraw. In consideration of this sale and transfer, the Laclede company agreed to pay to the St. Louis company the sum of \$850,000. A dividend of \$600,000 of this money was ordered by the directors, and of this, \$4,995 came into the hands of the Pennsylvania company as trustee of the one hundred shares of stock conveyed to it by the deed, or power of attorney, of James Martin. It is thus manifest that the money in dispute comes, not from the annual earnings of the company, but from a sale of part of its property; part of that

by a corporation *out of funds arising from a sale of a part of its original franchises*, the court held that it must be regarded, as

very *corpus* which the stock shares represent, and without which those shares have neither substance or value. If therefore the life-tenant is entitled to this money thus derived from the capital of this corporation, so in the end may she come to be entitled to the whole *corpus* of the trust. For the accomplishment of this result, it is only necessary that the St. Louis Gas Company should effect a sale of the balance of its property, and order a distribution of the money so raised among its shareholders. But logically the effect of such a doctrine is to defeat the whole object of the trust. Instead of securing for Mrs. Vinton a sure income for life, it gives her the principal to use at her pleasure, whilst the gift over to Frederick Vinton is wholly defeated. A rule such as this, which may operate disastrously on a large and important class of our trusts, we cannot agree to adopt. It is indeed true, as said by Mr. Chief-Justice CHAPMAN, in *Minot v. Paine*, 99 Mass. 101, that the rule which regards cash dividends, however large, as income, and stock dividends, however made, as capital, is a very simple and convenient one, and may relieve trustees and courts of much trouble; but it is certainly not one that commends itself for its justice and equity, neither does it at all regard the facts of a case like that of *Earp's Appeal*, *ante*, or like the case in hand. To us, it seems like a bungling rule of law, that at one time would give what is indisputably income to the remainderman, and at another, what is as clearly capital to the life-tenant. It is, however, enough for us that our own authorities repudiate such a rule. In the case last referred to, it was held that dividends from a corporate surplus fund, accumulated before the testator's death, must be regarded as part of the stock forming the trust fund, whilst after-accumulations, though distributed in the shape of stock, must be treated as income, and go to the life-tenant. In like manner it was held in *Wiltbank's Appeal*, 64 Penn. St. 25, that the earnings or profits of the stock of a decedent, made after his death, were income, though put into the form of capital

by the issue of new stock; and it was there said, that "equity, seeking the substance of things, found that the new stock was but a product, and was therefore income." So may we say in this case; equity seeking, not mere convenience, but the substance of things, finds the dividend in controversy to be part of the actual capital of the company; money raised by a sale of part of its original franchise and realty; that which its stock most specifically and directly represents; hence it awards the product to him in whom the stock is finally to vest. Assume the contrary doctrine, and that which we have already pointed out may at any time occur; on a sale of the entire franchise and property of the gas company, with a like order by its directors for a distribution of the money so raised, the dividends must go, regardless of the equities of the parties, to the life-tenant, and nothing whatever be left for the remainderman. This might be very convenient for trustees and courts, for as it would definitely close out the trust, there would be no further trouble about it; nevertheless the justice of such a disposition of the trust would be more than doubtful. Again, this same doctrine, which makes a cash dividend income, and a stock dividend capital, would often work with equal harshness upon the interest of the life-tenant. For corporate earnings might be retained for an indefinite length of time, and then be distributed in the shape of stock shares, which the rule contended for would at once pronounce to be capital, and thus would the beneficiary be deprived of his or her income. Than this, far better is our Pennsylvania doctrine, admirably stated by our brother, Mr. Justice PAXSON, in *Moss's Appeal*, as follows: 'But where a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity which disregards the form and grasps the substance would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits.'

between a life tenant and a remainderman, as a part of the stock, — *as capital*, and not as income.

**SEC. 75. How payable.**—All dividends are presumed to be payable in lawful money, and even where it was declared to be “payable in New York State currency” it was held to be payable in lawful money.<sup>1</sup> The corporation has no rights to retain a debt due to it from a stockholder out of his dividend,<sup>2</sup> unless it may be for a debt due for the stock itself,<sup>3</sup> or when the corporation has a lien upon the stock for debts due to it.<sup>4</sup>

**SEC. 76. Infants as Stockholders.**—An infant may be a stockholder in a corporation, but he cannot be made liable as an original subscriber to the capital stock; and where the charter or contract of subscription requires that a certain amount of stock shall be subscribed before the subscription thereto shall be binding, the subscriptions of infants, insolvent persons, and married women must be excluded.<sup>5</sup> His subscription is not void, but merely voidable,<sup>6</sup> and may be affirmed or avoided when he attains majority. If he retains the stock or the benefits he has derived from it after he arrives of age, for an unreasonable period, he is treated as affirming the contract, and becomes liable upon his subscription;<sup>7</sup> but he cannot effectually repudiate the subscription while he is in his minority, as when he attains his majority he may disaffirm his disaffirmance within a reasonable time.<sup>8</sup> So long as an infant subscriber elects to remain a shareholder under his subscription, he may exercise all the rights of a shareholder;<sup>9</sup> and a mere plea of infancy against an action to recover a subscription to stock is not sufficient, but should also set up a disaffirmance of the subscription, and be accompanied by an offer to restore all pecuniary benefits derived therefrom, if any have been received.<sup>10</sup>

<sup>1</sup> *Ehle v. Chittenango Bank*, 24 N. Y. 548. And a dividend declared in general terms is payable in lawful money, although the profits earned were received in Confederate money, an unlawful and worthless currency; and it was held that parol evidence was not admissible to alter the legal effect of the resolution. *Scott v. Central R. R., &c. Co.*, 52 Barb. (N. Y.) 45.

<sup>2</sup> *Attorney-General v. State Bank*, 1 D. & B. (N. C.) Ch. 545; *March v. Eastern R. R. Co.*, 43 N. H. 515.

<sup>3</sup> *Citizens', &c. Ins. Co. v. Scott*, 45 Ala. 185; *Bates v. N. Y. Ins. Co.*, 3 John. Cas. (N. Y.) 238.

<sup>4</sup> *Hagar v. Union National Bank*, 63 Me. 509.

<sup>5</sup> *Phillips v. Covington Bridge Co.*, 2 Met. (Ky.) 219.

<sup>6</sup> *Cork, &c. Railway Co. v. Cazenore*, 10 Q. B. 935; *Birkenhead, &c. Railway Co. v. Pilcher*, 6 Eng. Railway and Canal Cas. 622.

<sup>7</sup> *Birkenhead, &c. Railway Co. v. Pilcher*, *ante*.

<sup>8</sup> *Birkenhead, &c. Railway Co. v. Pilcher*, *ante*.

<sup>9</sup> *Kelley's Case*, Brownlow, 120; *Holmes v. Blogg*, 2 Moore, 552; *Williams v. Moor*, 11 M. & W. 256.

<sup>10</sup> *Evelyn v. Chichester*, 3 Burr, 1717; *Birkenhead, &c. Railway Co. v. Pilcher*, *ante*.

## CHAPTER IV.

## CAPITAL STOCK, FORFEITURE OF SHARES IN.

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| SEC. 77. Effect of.                              | SEC. 83. Duty of Directors as to Calls.                                      |
| 78. Forfeited Stock may be Reissued.             | 84. Demand and Notice of Calls.  |
| 79. Collusive Forfeitures.                       | 85. Rule as to Notice when neither<br>Charter nor By-law provides<br>for it. |
| 80. Status of Stockholder after For-<br>feiture. | 86. Demand unnecessary, when.  |
| 81. Forfeiture without Authority.                |  |
| 82. Compromises with Stockholders.               |  |

SEC. 77. **Effect of.** — Where the charter of a railroad company or the general law gives to the corporation authority to require payment of the sums subscribed to the capital stock, and to sell the stock of a subscriber thereto who fails to pay his instalments when due, the remedy given by the statute is merely cumulative;<sup>1</sup> and if the stockholder does not pay his instalments, it is held by most of our courts that an action lies against him upon an implied promise to pay the instalments, unless the statute or the language of the subscription excludes such a remedy.<sup>2</sup> Thus, in a Connecticut case,<sup>3</sup> a corporation was created by the legislature for the purpose of constructing a railroad, with the general powers and privileges usually granted to corporations for a similar purpose. The capital stock was to be \$500,000, with the privilege of increasing it to \$1,000,000, to be divided into shares of \$100 each, transferable as the by-laws

<sup>1</sup> Unless the power is given by statute it does not exist, and cannot be exercised by a mere resolution of the directors. *Campbell's Case*, L. R. 9 Ch. 1; *Barton's Case*, 4 De G. & J. 46; *Clarke v. Hart*, 6 H. L. Cas. 633. Nor can the power to forfeit be exercised, where it is given as a remedy in case payment can be obtained in no other way, until the remedy by action has first been exhausted. *Stanhope's Case*, L. R. 1 Ch. 161; *Richmond's Case*, 4 Kn. 305. And being a matter *stricti juris*, it can be put in force only for its true purpose, — *Bedford R. R. Co. v. Bowler*, 48 Penn. St. 29, — and with a due regard to the statutory formalities.

<sup>2</sup> *Hartford, &c. R. R. Co. v. Kennedy*, 12 Conn. 499. The right to forfeit stock does not exist except when expressly given by statute. *Turnpike Co. v. Imlay*, 4 N. J. L. 285; *Downing v. Potts*, 23 N. J. L. 66; *Re Long Island R. R. Co.*, 19 Wend. (N. Y.) 354. In Massachusetts it is expressly provided by statute that in the case of railroad stocks, for non-payment of assessments they shall be sold at auction, and that the shareholder shall be liable for the balance. In New York a forfeiture of stock is held to terminate the stockholder's liability. *Mills v. Stewart*, 41 N. Y. 384.

<sup>3</sup> *Hartford, &c. R. R. Co. v. Kennedy*, *ante*.

should direct; books were to be opened for subscriptions to the capital stock; the directors of the company were authorized to require payment of the sums subscribed to the capital stock; and in case any stockholder should neglect to make payment accordingly, the directors were empowered to sell his shares at public auction, and to apply the avails to such payment, returning the surplus, if any, to him. A., with others, signed a writing in these words: "We do hereby subscribe to the stock of said railroad the number of shares annexed to our names respectively, on the terms, conditions, and limitations mentioned in the charter;" paying, at the same time, \$5 on each share subscribed. On a reduction and apportionment of the subscriptions, ten shares were allowed to A., who received from the company a certificate thereof, specifying the sum paid, and declaring the residue to be payable by instalments, as they should be ordered by the directors. Subsequent instalments were required by the directors, which A. refused to pay. In assumpsit, brought by the company against A. for such instalments, it was held, (1.) that from the relation of stockholder and company, thus created, a promise by the defendant was implied to pay the instalments in question; (2.) that the remedy provided by the clause authorizing a sale of the stock of delinquent stockholders, was cumulative merely, leaving such promise in full force.<sup>1</sup> In other words,

<sup>1</sup> Mann v. Cooke, 20 Conn. 178; Danbury R. R. Co. v. Wilson, 22 id. 435; Harlem Canal Co. v. Seixas, 2 Hall (N. Y.), 504; London Grand Junction Railway Co. v. Graham, 1 Q. B. 271; Edinburgh, &c. Railway Co. v. Hebbelthwaite, 6 M. & W. 707; Sagory v. Dubois, 3 Sandf. Ch. (N. Y.) 466; Small v. Herkimer Mfg. Co., 2 N. Y. 380; Northern R. R. Co. v. Duane, 2 Am. L. J. 481; Troy, T. & R. R. Co. v. McChesney, 21 Wend. (N. Y.) 296; Essex Bridge Co. v. Tuttle, 2 Vt. 393; Seymour v. Sturgis, 26 N. Y. 184; Kennebec, &c. R. R. Co. v. Kendall, 31 Me. 470; Ogdensburgh, &c. R. R. Co. v. Frost, 21 Barb. (N. Y.) 641; Buffalo, &c. R. R. Co. v. Dudley, 14 N. Y. 336; Troy & Boston R. R. Co. v. Tibbetts, 18 Barb. (N. Y.) 297; Northern R. R. Co. v. Miller, 10 id. 260; Goshen Turnpike Co. v. Hurlin, 9 John. (N. Y.) 216; Spear v. Crawford, 14 Wend. (N. Y.) 20; Hightower v. Thornton, 8 Ga. 486; Delaware, &c. Canal Co. v. Sanson, 1 Binn. (Penn.) 70; Raymond v. Caton, 24 Ill. 123; Peoria, &c. R. R. Co. v. Elting, 17 id. 429; Tar River Navigation Co. v. Neal, 3 Hawks (N. C.), 520; Gratz v. Redd, 4 B. Mon. (Ky.) 178; Rockville, &c. Co. v. Maxwell, 2 Cr. (U. S. C. C.) 451; Bond v. Bridge Co., 6 H. & J. (Md.) 128; Bergen v. Clarkson, 6 N. J. L. 352; Baltimore v. Howard, 6 H. & J. (Md.) 383; Dutchess Cotton Mill Mfg. Co. v. Davis, 14 John. (N. Y.) 238; Beene v. Cahawba, &c. R. R. Co., 3 Ala. 660; London, &c. R. R. Co. v. Graham, 1 Ad. & El. 270; Bristol, &c. R. R. Co. v. Locke, id. 25; Gray v. Turnpike Co., 4 Rand. (Va.) 578. In England, under a statute which authorizes the company to sue for unpaid calls, and also authorizes the company to forfeit stock on which calls are unpaid, whether they have sued or not, the remedies are not alternative; and after commencing a suit the company may declare a forfeiture and also prosecute the action until the claim is satisfied. Great Northern Railway Co. v.



a subscription for stock which is divided into shares of a definite par value, payable in instalments as called for by the corporation, is equivalent to a promise to pay calls as they are legally made, until the full par value is paid;<sup>1</sup> and the corporation may forfeit the stock, or proceed by action to recover the amount of the calls, at its option.<sup>2</sup> And where the stock has been assigned, *and a new*

Kennedy, 4 Exch. 417. The rule is otherwise where the two powers are expressed in the alternative. *Giles v. Hutt*, 3 Exch. 18. In one case, by the private act of the company, power was given to cancel any forfeited shares where the market was not sufficient to realize a sum equal to the arrears of the calls, and to issue so many new shares, and of such nominal amount as they might think fit, provided the capital to be represented by such new shares should not in the whole exceed the capital represented by the unpaid portion of the shares which should be so cancelled. It was held that the remedy given by this latter provision was cumulative, and that an action for calls was maintainable, notwithstanding that the shares had been forfeited and cancelled; and that it was no answer to the action, to say that new shares had been issued and sold in lieu of the cancelled shares, which realized a sum greater than the unpaid portion of the cancelled shares; but that the original shareholders would be entitled to the benefit of payments made in respect of the new shares. *Inglis v. Great Northern Railway Co.*, 16 Jur. 895; *Rutland & Burlington R. R. Co. v. Thrall*, 35 Vt. 536. But in Massachusetts it is held that an action will not lie for an assessment unless there is an express agreement to pay it. *Andover Turnpike Co. v. Gould*, 6 Mass. 40; *Katama Land Co. v. Jernegan*, 126 Mass. 155. But this does not apply to railroad subscriptions as to the balance due after sale of the stock, as the statute expressly gives a remedy therefor. *Troy & Greenfield R. R. Co. v. Newton*, 1 Gray (Mass.), 544.

<sup>1</sup> *Hartford, &c. R. R. Co. v. Kennedy*, 12 Conn. 499; *Anderson v. Newcastle, &c. R. R. Co.*, 12 Ind. 376; *Johnson v. Wabash, &c. R. R. Co.*, 16 Ind. 389; *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 336; *Penobscot R. R. Co. v. Dummer*, 40 Me.

172; *Tonica, &c. R. R. Co. v. McNeely*, 21 Ill. 71. And this is so, even though there was an agreement that the subscriber should have the shares at less than their par value. *New Albany R. R. Co. v. Slaughter*, 10 Ind. 218; *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124; *Mann v. Cooke*, 20 Conn. 187; *New Albany R. R. Co. v. Field*, 10 Ind. 187; *Robinson v. Pittsburgh, &c. R. R. Co.*, 32 Penn. St. 334; *Downie v. White*, 12 Wis. 176. If the charter gives the corporation authority to provide for a forfeiture but it has not done so, it cannot forfeit stock. *Perrin v. Granger*, 30 Vt. 595.

<sup>2</sup> *Railroad Co. v. Rodrigues*, 10 Rich. (S. C.) 278; *Tar River Nav. Co. v. Neal*, 3 Hawks (N. C.), 520. This question was well considered in *Mann v. Cooke*, 20 Conn. 187. In that case a railroad company being incorporated by the legislature of the State of New York, its charter authorized the directors to require payment of subscriptions to the capital stock, under the penalty of the forfeiture of the shares, with the payments made thereon. This company was duly organized under its charter, its original capital fully subscribed, and ten per cent thereof paid in. Afterwards authority was given to increase the capital stock. Soon after the original stock was taken up, M. purchased 11,265 shares of it, and then became insolvent, and unable to pay the unpaid balance which would be due to the company on its calls. He thereupon transferred these shares to D. in trust for the company, so as to be reinvested therein; and the company immediately received new subscriptions to the same amount. Among the new subscribers was C., who subscribed for forty shares. The subscription was made upon a condition that all future calls should be paid as required, or the shares should become the property of the company, and be sold for its benefit. D.

*certificate* has been issued to the assignee, the assignee becomes personally liable to pay all instalments called for, after such transfer;<sup>1</sup> and this would also seem to be the rule, whether a new certificate has been issued to the assignee or not, if the transfer of the stock to the assignee has been made upon the books of the company; upon the ground that, after the assignment and transfer, the assignee holds the shares upon the same conditions, and subject to the same rules and orders as the original subscriber held them, and is substituted in his place and stead.<sup>2</sup> Whether the transfer is made by the proper entry on the company's books or by the issue of a new certificate, the assignee, in the one case as well as in the other, becomes not only the absolute owner of the stock, but also stands in the place and stead of the original stockholder, entitled to all his rights, and subject to all his liabilities respecting the stock.

thereupon made a transfer, on the books of the company, of forty shares, to C., who received a certificate of ownership from the president. The special terms of C.'s subscription were not known to the other subscribers; all whose subscriptions were made without any such condition. Some time afterwards, the company being largely indebted, and insolvent, and the greater part of the instalments on its stock unpaid, the president made an arrangement with C. to this effect, — that C. should immediately pay the instalments on twenty shares of his stock in full; and he was thereupon to be discharged from all liability on the other twenty shares. C. complied with these terms; and the money so paid was applied for the benefit of the company. A. was appointed under the laws of the State of New York, where the parties then lived, and all the transactions took place, a receiver of the effects of the company, which were duly assigned to him. On a bill in chancery brought in Connecticut by A. against the executrix of C. to obtain payment of the balance due on the forty shares subscribed by him, it was held, 1. That the provision in the charter for a forfeiture of stock, on non-payment of instalments, was merely a cumulative remedy, and did not supersede or impair any remedy otherwise existing. 2. That, in this case, a subscription for shares of the capital stock incurred a debt, which may be enforced, by any

appropriate common law or equitable remedy. 3. That the subscription of C. for forty shares, though peculiar in its terms, and made under peculiar circumstances, was not different in its legal effect from the other subscriptions. 4. That this corporation, created as it was for public purposes, could not receive a subscription, under a private arrangement, at less than the par value of the stock, as this would take from the company so much of its available means, and would thus operate as a fraud upon creditors and other stockholders. 5. That consequently the arrangement made between the president of the company and C., by which C. was to be discharged from the payment of further calls on twenty shares of the stock subscribed by him, was unavailing as against the receiver representing the creditors. 6. That consequently the plaintiff was entitled to a decree for the unpaid balance due on the forty shares subscribed by C., with interest thereon. See also *Hartford, &c. R. R. Co. v. Kennedy*, 12 Conn. 499; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 598; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466; *Mann v. Pratt*, 2 id. 273.

<sup>1</sup> *Hartford & New Haven R. R. Co. v. Boorman*, 12 Conn. 580; *Merrimac, &c. Co. v. Bagley*, 14 Mich. 501.

<sup>2</sup> *Huddefield Canal Co. v. Buckley*, 7 T. R. 36; *Bend v. Susquehanna Bridge, &c. Co.*, 8 H. & J. (Md.) 128; *Mann v. Currie*, 2 Barb. (N. Y.) 294.

The obligation to pay for the stock is created by the subscription therefor, unless the contrary is plainly expressed by the conditions of the subscription; and the right of forfeiture and sale of shares, on the failure of payment of subscriptions, is not merely an exclusive remedy, unless it is so provided by the terms of the subscription or the provisions of the charter or statute under which the corporation is created.<sup>1</sup> But in some cases it has been held that the corporation must elect *which* remedy it will pursue, and that when it has a choice of remedies, it cannot pursue both; and that where there is

<sup>1</sup> See *Glass Co. v. Alexander*, 2 N. H. 380; *White Mountain R. R. Co. v. Eastman*, 34 id. 147; *Spear v. Crawford*, 14 Wend. 20; *Troy Turnpike Co. v. McChesney*, 21 id. 296; *Mann v. Currie*, 2 Barb. (N. Y.) 294; *Northern R. R. Co. v. Miller*, 10 id. 260; *Troy, &c. R. R. Co. v. Kerr*, 17 id. 581; *Troy, &c. R. R. Co. v. Tibbetts*, 18 id. 297; *Ogdensburgh, &c. R. R. Co. v. Frost*, 21 id. 541; *Goshen Turnpike Co. v. Hurtin*, 9 John. (N. Y.) 217; *Dutchess Cotton Mfg. Co. v. Davis*, 14 id. 238; *Harlem Canal Co. v. Seixas*, 2 Hill (N. Y.), 504; *Delaware Canal Co. v. Sansom*, 1 Binn. (Penn.) 70; *Tar River Navigation Co. v. Neal*, 3 Hawks (N. C.), 520; *Greenville, &c. R. R. Co. v. Smith*, 6 Rich. 91; *Charlotte, &c. R. R. Co. v. Blakely*, 3 Strobb. (S. C.) 245; *Selma, &c. R. R. Co. v. Tipton*, 5 Ala. 787; *Gayle v. Cahawba, &c. R. R. Co.*, 8 id. 586; *Freeman v. Winchester*, 19 Miss. 577; *Elysville Co. v. Okisko*, 1 Md. Ch. 392; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178; *Barnet v. Alton, &c. R. R. Co.* 13 Ill. 504; *Klein v. Alton, &c. R. R. Co.*, id. 514; *Ryder v. Same*, 13 id. 516; *Peoria, &c. R. R. Co. v. Elting*, 17 id. 429; *Essex Bridge Co. v. Tuttle*, 2 Vt. 393; *City Hotel Co. v. Dickinson*, 6 Gray (Mass.), 586; *Lexington, &c. R. R. Co. v. Chandler*, 13 Met. (Mass.) 311; *Hart, &c. R. R. Co. v. Kennedy*, 12 Conn. 499; *Ward v. Griswoldville Mfg. Co.*, 16 id. 593; *Mann v. Cooke*, 20 id. 178. But where the stock of the company is defined in its charter, and is divided into shares of a definite amount in money, a subscription for shares is justly regarded as equivalent to a promise to pay calls, as they shall be legally made to the amount of the shares. This may now be regarded as set-

tled, both in this country and in England, and that the power given the company to forfeit and sell the shares, in cases where the shareholders fail to pay calls, is not an exclusive, but a cumulative remedy, unless the charter or general laws of the State provide that no other remedy shall be resorted to by the company. 1 Redf. on Rail., § 49. See also *Hartford & N. H. R. R. Co. v. Kennedy*, 12 Conn. 499; *Mann v. Cooke*, 20 id. 178; *Dayton v. Borst*, 31 N. Y. 435; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Goshen Turnpike Co. v. Hurtin*, 9 John. (N. Y.) 217; *Dutchess Mfg. Co. v. Davis*, 14 id. 238; *Troy Turnpike Co. v. McChesney*, 21 Wend. (N. Y.) 296; *Northern R. R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Plank Road v. Payne*, 17 id. 567; *Troy & Boston R. R. Co. v. Tibbetts*, 18 id. 297; *Ogdensburgh R. R. Co. v. Frost*, 21 id. 541; *Herkimer M. & H. Co. v. Small*, 21 Wend. (N. Y.) 273; s. c., 2 Hill, 127; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466; *Mann v. Currie*, 2 Barb. 294; *Ward v. Griswold Mfg. Co.*, 16 Conn. 593; *Lexington & W. C. R. Co. v. Chandler*, 13 Met. (Mass.) 311; *Klein v. Alton, &c. R. R. Co.*, 13 Ill. 514; *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161; *Greenville, &c. R. R. Co. v. Smith*, 6 Rich. (S. C.) 91; *Freeman v. Winchester*, 19 Miss. 577; *Selma R. R. v. Tipton*, 5 Ala. 787; *Troy, &c. R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581. But if the stockholder is only made liable *after* a sale of stock, the statute must be pursued, and he would only be liable for a deficiency after the sale. *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578; *Essex Bridge Co. v. Tuttle*, 2 Vt. 393. See also *Rensselaer & W. Plank Road Co. v. Barton*, 16 N. Y. 457.

a right of forfeiture, but no express power to use both remedies, the election of the right of forfeiture precludes the right of ordinary action. Thus, under a charter containing such provisions, where an action was commenced against a subscriber, to recover certain instalments, and the stock was afterward forfeited for the non-payment of a subsequent and last call, a plea of such forfeiture in bar of the further prosecution of the action was sustained.<sup>1</sup>

It is held in England that under such a statute, where the forfeiture and sale of the shares does not produce a sum sufficient to meet the subscription, an action will lie for the deficiency;<sup>2</sup> but in

<sup>1</sup> *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330, — overruling *Herkimer Mfg. Co. v. Small*, 21 Wend. (N. Y.) 273, and 2 Hill (N. Y.), 177. See also *Kennebec & Port. R. R. Co. v. Kendall*, 31 Me. 470; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437. If in such cases the company fails to exercise its power of forfeiture, as the successive defaults occur, until all the defaults for payment of calls occur, it loses its remedy by sale. *Stokes v. Lebanon, &c. R. R. Co.*, 6 Humph. (Tenn.) 241; *Harlem Canal Co. v. Seixas*, 2 Hall (N. Y.), 504; *Delaware Canal Co. v. Sansom*, 1 Binn. (Penn.) 70. A power conferred by the legislature on a corporation to sell the stock of a subscriber for default of payment of an instalment by him does not exclude the common-law remedy to recover the amount; but he is still liable in an action of *assumpsit* on his promise in the subscription. The penalty of forfeiture is cumulative; and the company may waive it, and proceed *in personam* on the promise. *London Grand Junction Railway Co. v. Graham*, 1 Q. B. 271; *Birmingham, Bristol & Thames Railway Co. v. Locke*, 1 Q. B. 256; *Highland Turnpike Co. v. McKean*, 11 John. (N. Y.) 109; *Dutchess Cotton Mfg. Co. v. Davis*, 14 id. 238; *Spear v. Crawford*, 14 Wend. (N. Y.) 20; *Troy Turnpike & R. R. Co. v. McChesney*, 21 id. 296; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466; *Harlem Canal Co. v. Seixas*, 2 Hall (N. Y.), 504; *Stokes v. Lebanon & Sparta Turnpike Co.*, 6 Humph. (Tenn.) 241; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155; *Klein v. Alton & Sangamon R. R. Co.*, 13 Ill. 514; *Hartford & New Haven*

*R. R. Co. v. Kennedy*, 12 Conn. 499; *Instone v. Bridge Co.*, 2 Bibb (Ky.), 577; *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578; *Rockville & Washington Turnpike Road v. Maxwell*, 2 Cranch (U. S. C. C.), 451. In this respect there is nothing to distinguish the case of an assignee from that of an original stockholder. See *Mann v. Currie*, 2 Barb. (N. Y.) 294. The rule is the same, although the subscription is a promise upon pain of forfeiture, etc. The company may sue as upon an absolute promise. *Troy Turnpike & R. R. Co. v. McChesney*, 21 Wend. (N. Y.) 296. That the forfeiture can only be enforced on a full compliance with the provisions of the act, see *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155.

<sup>2</sup> *Inglis v. Great Northern Railway Co.*, 1 McQueen, 112. See also *Lexington, &c. R. R. Co. v. Chandler*, 13 Met. (Mass.) 311; *Hartford, &c. R. R. Co. v. Kennedy*, 12 Conn. 499; *Cross v. Mills Co.*, 17 Ill. 54; *Peoria, &c. R. R. Co. v. Elting*, 17 id. 429. In *Merrimac, &c. Co. v. Bagley*, 14 Mich. 501, it was held that a stockholder in a mining corporation organized under the general mining law, although not one of the original subscribers, is liable for balances due upon assessment after applying the proceeds of his stock, sold for default. So in *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 435, the subscriber for stock was held liable to an action for the deficiency; but in both the last cited cases, it will be observed that the statute made a provision to that effect, so that the cases cannot be said to sustain the doctrine of the English case. And *Herkimer Mfg. Co. v. Small*, 21 Wend.

an earlier case, in *exchequer*,<sup>1</sup> it was held that where a corporation obtains a judgment against a stockholder for the amount of a call, it cannot afterwards proceed to declare the stock forfeited because the judgment is unpaid.<sup>2</sup> But in all these cases, the question as to whether the remedy by forfeiture is exclusive or merely cumulative, or whether a stockholder whose stock has been forfeited is liable for any deficiency, is one which depends so largely upon the true construction of the statute under which the corporation is created, and upon the subscription itself, that no general rule applicable to all cases can be given.

Stock can only be forfeited where the assessment is legally within the power of the company to make, and made in conformity with the power conferred, whether the mode is provided by statute or the by-laws of the company made by virtue of authority conferred by statute.<sup>3</sup> A sale of stock under an invalid assessment, whether the invalidity results from a non-compliance with the law relating to the sale, or because the assessment is larger than is permitted by the charter or by-laws, or indeed for any cause, confers no title upon the purchaser, and does not divest the shareholder of his rights, if he acts promptly in procuring the sale to be annulled.<sup>4</sup> A sale of corporate stock by the corporation, for non-payment of an

(N. Y.) 273, and *Troy, &c. R. R. Co. v. McChesney*, 21 id. 296, holding that doctrine were overruled in *Small v. Herkimer Mfg. Co.* 2 N. Y. 330. In *Lexington, &c. R. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556, it was held that, where the stock is forfeited, the stockholder is absolved from all further liability to the company or its creditors. See also *Rutland & Burlington R. R. Co. v. Thrall*, 35 Vt. 536, where it was held that after the stock was forfeited, even though not sold, the stockholder was released from further liability upon his subscription. But if the stockholder has given a note for the stock, its forfeiture for non-payment of assessments thereon does not relieve him from liability upon the note. *Mitchell v. Rome R. R. Co.*, 17 Ga. 574.

<sup>1</sup> *Giles v. Hutt*, 3 Exchq. 18.

<sup>2</sup> See *Marsh v. Pier*, 4 Rawle (Penn.), 273, and *Floyd v. Browne*, 1 id. 121, where it is held that pursuing one of several remedies to judgment, is a bar to others.

*Edinburgh Railway Co. v. Hebblethwaite*, 6 M. & W. 707; *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451; *Portland, &c. R. R. Co. v. Graham*, 11 Met. (Mass.) 1; *Moosehead Lake R. R. Co. v. Cottrell*, 66 Me. 185; *Johnson v. Albany, &c. R. R. Co.*, 40 How. Pr. (N. Y.) 193; *Heaton v. Cincinnati, &c. R. R. Co.*, 16 Ind. 275; *Germantown, &c. R. R. Co. v. Fitter*, 60 Penn. St. 124; *Downing v. Potts*, 23 N. J. L. 66; *Somerset R. R. Co. v. Clarke*, 61 Me. 379; *York, &c. R. R. Co. v. Ritchie*, 40 Me. 425; *Lexington, &c. R. R. Co. v. Staples*, 5 Gray (Mass.), 522.

<sup>4</sup> *Stoneham Branch R. R. Co. v. Gould*, 2 Gray (Mass.), 277; *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451. For want of proper notice, *Portland, &c. R. R. Co. v. Graham*, 11 Met. (Mass.) 1. For selling at a place other than that named in the by-law or notice, *Lewey's Island R. R. Co. v. Bolton*, *ante*; and according to the last case, the burden is on the purchaser or party affirming the sale to establish its validity.

assessment, must follow strictly the law of the State wherein the corporation exists, and the charter and by-laws of the corporation. If such sale is allowed only under regulations first made by the by-laws, and no such regulations have been made, there can be no valid sale.<sup>1</sup> The fact that there is a provision in the articles of agreement of a private joint-stock company that, upon default by a shareholder of payment of assessments, his shares shall be forfeited, does not authorize the trustees, by a naked declaration, to make a forfeiture against which a court of equity cannot grant relief. In a proper case a redemption may be obtained on bill in equity.<sup>2</sup>

A subscriber for shares in a railroad company refused to pay the assessments; and the company, instead of declaring the shares forfeited, procured subscriptions from other persons to the full amount of the capital stock. It was held that this precluded the company from afterwards selling the shares and suing the subscriber for the difference between the assessment and the sum for which they were sold.<sup>3</sup> This remedy being purely statutory, the provisions of the statute must be as strictly complied with as is required in the case of any other statutory remedy.<sup>4</sup> Thus, where the statute provides that "the directors may order the treasurer to sell," they cannot authorize a committee or other officer to do so.<sup>5</sup> Where a corporation has power to sell stock of a corporator for the payment of each call as it is made, and to hold the stockholder responsible for the deficiency, if the corporation fails to sell the stock as each successive defalcation occurs, and waits until all the calls are made, it thereby loses its remedy by sale.<sup>6</sup>

Under a statute authorizing the company to sell, and, in case of deficiency, to recover the deficiency by motion, it was held that they might proceed by motion, although for want of bidders they had not made the sale which they advertised.<sup>7</sup>

**SEC. 78. Forfeited Stock may be reissued.**—Where stock has been forfeited to the company, or it otherwise comes into its ownership and possession on whatever ground, it is not merged *and extin-*

<sup>1</sup> Mitchell v. Vermont Copper Mining Co., 40 N. Y. Sup. Ct. 406.

<sup>2</sup> Walker v. Ogden, 1 Biss. (U. S. C. C.) 287.

<sup>3</sup> Athol, &c. R. R. Co. v. Inhabitants, &c., 110 Mass. 213.

<sup>4</sup> Eastern Plank Road Co. v. Vaughan, 20 Barb. (N. Y.) 155.

<sup>5</sup> York, &c. R. R. Co. v. Ritchie, 40 Me. 425.

<sup>6</sup> Sparta v. Lebanon & Sparta Turnpike Co., 6 Humph. (Tenn.) 241. Compare Brockenbrough v. James River, &c. Co., 1 Patt. & H. (Va.) 94.

<sup>7</sup> Grays v. Turnpike Co., 4 Rand. (Va.) 578; Franklin Glass Co. v. White, 14 Mass. 286.

*guished*, but may be reissued by the corporation.<sup>1</sup> Mr. Brice in his excellent treatise on "Ultra Vires" (p. 192), says, "It is often assumed that a forfeiture or a surrender is necessarily, in the absence of express controlling language, a destruction of the shares in question; and it is consequently urged, as an argument against the existence of such implied powers, that their exercise would be *pro tanto* a diminution of capital. But such reasoning is founded on a fallacy, or rather on a mistaken notion of what is involved in these powers. A forfeiture, and *a fortiori* a surrender, of shares, especially when it is by way of transfer to a nominee of the company, puts an end to the shareholder's future rights and liabilities.<sup>2</sup> But it does not destroy the thing styled 'share' or 'interest' in the company: this still remains intact, as an actual entity, unless and until the company, by some further act, expressly destroys it. 'Cancellation of shares is no more a reduction of capital than is forfeiture of shares.'<sup>3</sup>

"It is perhaps even more generally laid down that cancellation involves the diminution of capital. The objection is worth more than when applied to forfeiture, because *ex vi termini* a cancellation denotes the destruction of shares. But all that is meant by this is simply the destruction of the rights and liabilities of a particular shareholder, and, if necessary, of the pieces of paper or other documents representing the same. But *the capital of the company is totally distinct from the rights of shareholders therein*. The powers of the company with respect thereto remain unaltered, and immediately upon the cancellation of one member's interests, it may issue new shares of an equivalent amount. This seems the only rational conclusion; and it is supported by the *dictum* already cited,<sup>4</sup> and by the provisions of the Companies Clauses Act, 1863, that new shares may be issued in lieu of cancelled shares."<sup>5</sup>

SEC. 79. **Collusive Forfeitures.** — Even in those jurisdictions where a forfeiture releases a stockholder from further liability, collusive forfeitures, made for the express purpose of releasing the subscriber from further liability, are held not to have that effect.<sup>6</sup>

<sup>1</sup> *Currier v. Slate Co.*, 56 N. H. 262; *Taylor v. Miami, &c. Co.*, 6 Ohio, 176; *State v. Smith*, 48 Vt. 266.

<sup>2</sup> Usually his past liabilities remain intact. See the Companies Act, 1862, table A, arts. 17-19; the Companies Clauses Act, 1845, §§ 29-35.

<sup>3</sup> *Per GIFFARD, V. C.*, in *Marshall v. Glamorgan Iron Co.*, L. R. 7 Eq. 129, 137.

<sup>4</sup> *Id.*

<sup>5</sup> 26 & 27 Vict. c. 118, § 11.

<sup>6</sup> *Spackman v. Evans*, L. R. 3 H. L. 171; *Gower's Case*, L. R. 6 Eq. 77; *Stanhope's Case*, L. R. 1 Ch. 161; *Richmond's Case*, 4 K. & J. 305; *Thompson's Liability of Stockholders*, 223, § 194.

"If," says MURRAY, J.,<sup>1</sup> "the judge had found that this forfeiture was made by collusion and fraud between the directors of the company and the respondent, his liability would not cease." In an English case,<sup>2</sup> the directors of a company made an arrangement with a shareholder who wished to retire from the company, that on payment by him of a sum of money, his shares should be declared forfeited for non-payment of a call which had been made. The money was paid, and the shares were transferred to the company. Twelve years afterwards the company was wound up, and two years after that an application was made to place the shareholder on the list of contributories. It was held that the shareholder ought to be placed on the list, as the arrangement was not within the power of the directors, and was a fraud on the other shareholders.

SEC. 80. *Status of Stockholder after Forfeiture.*—In England<sup>3</sup> it is held that a shareholder whose shares have been forfeited remains liable to pay calls owing at the time of the forfeiture, but not for interest thereon. Thus, in the case last cited, the articles of association of a company provided that if any member failed to pay any call due from him at the time appointed for payment thereof, he should be liable to pay interest for the same, at the rate of 25 per cent, from that time to the time of actual payment; and also that the forfeiture of any share should involve the extinction, at the time of the forfeiture, of all claims and demands against the company in respect of the share, and all other rights incident to the share; but any member whose share had been forfeited was, notwithstanding, to be liable to pay to the company all calls owing on such shares at the time of forfeiture. It was held that a member whose shares had been forfeited, was liable to pay calls owing at the time of forfeiture, but not any interest thereon. But in New York<sup>4</sup> the forfeiture is held to release the subscriber from all liability past or present, either for calls or debts created by the corporation. Mr. THOMPSON,<sup>5</sup> in speaking of the effect of arrangements between a corporation and a stockholder for the release of the latter, says: "The American courts have steadily annulled all arrangements between corporations and their stockholders whereby the latter were sought to be released from their liability to creditors.

<sup>1</sup> *Mills v. Stewart*, 41 N. Y. 386.

<sup>4</sup> *Mills v. Stewart*, *ante*.

<sup>2</sup> *Re Agricultural Ins. Co.*, L. R. 1 Ch. 161.

<sup>5</sup> *Thompson on Liability of Stockholders*, 234, § 201.

<sup>3</sup> *Blakeley's Ordnance Co.*, L. R. 5 Eq. 6.



Thus, it has been held that a resolution by the directors of a corporation that no further calls should be made on account of stock subscribed was void, and a receiver of the corporation could proceed in equity to compel payment of what was due on account of such subscriptions to the capital stock.<sup>1</sup> So, a resolution passed by the directors of an insurance company releasing the stockholders from the payment of balances remaining unpaid on their stock, in accordance with which the certificates of shares were stamped 'non-assessable,' was held void as against policy-holders who had insured in the company without knowledge of the existence of such an agreement.<sup>2</sup> This being so, the mere fact that the word 'unassessable' is printed on the certificates of shares given to a member does not impair his obligation to pay the amount due on such shares, created by the acceptance and the holding of such certificate. At most, its legal effect is said to be a stipulation against liability from further assessment or taxation after the entire one hundred *per cent* of the subscription shall have been paid.<sup>3</sup> Nor, under the Missouri statute of individual liability, will the delivery by a corporation to its shareholders of certificates of paid-up stock, when in fact only part of the par value has been paid, prevent a creditor of the corporation, who can show this fact, from having execution against the shareholder.<sup>4</sup> So, in an English case, a resolution rescinding a contract of subscription after other subscribers have put their names on the books on the faith of it is void as to them; and, whatever may have been the reason which moved the subscriber to execute it, he remains a contributor."<sup>5</sup>

**SEC. 81. Forfeiture without Authority.**—Where a forfeiture is declared without authority, in other words where it is *ultra vires*, a court of equity will, upon the application of the stockholder, restore him to his rights as a stockholder, or upon the application of a creditor or other stockholder, restore him to the list of contributories.<sup>6</sup>

<sup>1</sup> *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466. The word "non-assessable" upon the certificate of stock does not cancel or impair the obligation to pay the amount due upon the shares created by the acceptance and holding of such certificate. At most, its legal effect is a stipulation against liability from further assessment or taxation after the entire subscription of 100 per cent shall have been paid. *Upton v. Tribilcock*, 91 U. S. 45.

<sup>2</sup> *Upton v. Hansbrough*, 3 Biss. (U. S. C. C.) 417, 427.

<sup>3</sup> *Upton v. Tribilcock*, 91 U. S. 45.

<sup>4</sup> *Pickering v. Templeton*, 2 Mo. App. 424.

<sup>5</sup> *Holt's Case*, 1 Sim. (N. S.) 389.

<sup>6</sup> *Thompson's Liability of Stockholders*, 226; *Dixon's Case*, L. R. 5 Ch. 79; *Spackman v. Evans*, L. R. 3 H. L. 171.

SEC. 82. **Compromises with Stockholders.**—It is held in England<sup>1</sup> and also in some of the courts of this country, that a solvent corporation may make compromises with its stockholders, to settle disputes arising relative to their subscriptions, and to secure an adjustment may release them from a part of their subscriptions in order to secure the residue, — provided the compromise is made in good faith and without any sinister or collusive motives.<sup>2</sup> In order to give validity to such a compromise, *there must be either a bond fide dispute as to the liability of the subscriber, or he must be in such circumstances financially as to raise a reasonable doubt as to his ability to pay the entire subscription; and the release must not place the subscriber upon any better footing as to the stock retained by him than*

<sup>1</sup> Adamson's Case, L. R. 18 Eq. 676; Lord Belhaven's Case, 3 De G. J. & S. 41; Kepling v. Todd, L. R. 3 C. P. Div. 350; Bath's Case, L. R. 8 Ch. Div. 334.

<sup>2</sup> Philadelphia, &c. R. R. Co. v. Hickman, 28 Penn. St. 318; Bedford, &c. R. R. Co. v. Bowser, 48 id. 29; Miller v. Second Jefferson Building Association, 50 id. 32; Macon, &c. R. R. Co. v. Vason, 57 Ga. 314. But see Sawyer v. Hoag, 17 Wall. (U. S.) 610, where the court holds that the capital stock of a corporation, and especially an unpaid subscription therefor, constitutes a trust fund for the benefit of general creditors of the corporation, and that the trust cannot be defeated by any device short of an actual payment in good faith. In New Albany v. Burke, 11 id. 96, a compromise with a municipal corporation by which a part of its subscription was released was held valid. In that case the city of New Albany subscribed for \$200,000 of the capital stock of a railroad company, and issued bonds for a part of the subscription, the balance to be issued when the road was completed to a certain point. The bonds issued were pledged by the company to its creditors to secure an indebtedness of less than half their nominal value. The taxpayers of the city brought a bill in equity to enjoin the city from paying these bonds, upon the ground that they were invalid. These proceedings depreciated the value of the bonds, and the creditors threatened to sell them, which if done at that time would

result in great loss, as they would not satisfy the debt for which they were pledged. The company became embarrassed, and, as they could never comply with the conditions necessary to a further issue of bonds by the city, the city entered into negotiations with the company for the purchase of the bonds which it had issued. These bonds, to the amount of \$193,000, were purchased by the city from the company, the consideration being the payment of sundry indebtedness, and \$36,000 to creditors who held a portion of the bonds as collateral security. This purchase was made Sept. 8, 1867, and on Jan. 29, 1868, the transaction was assailed as *ultra vires* on the part of the city authorities, by judgment creditors of the corporation, who filed their bill to set aside the arrangement. The Supreme Court of the United States decided that this arrangement was not a modification of the subscription previously made, or a bonus given for a release, but rather a purchase of the city debt, not beyond the power of the contracting parties, and not fraudulent as to creditors of the corporation, since the evidence was uncontradicted that it was deemed, at the time, an advantageous sale or arrangement for the company; and, moreover, it was not made in secret, but on the contrary the ordinance of the city was published at the time. The court also held that, in any event, the *laches* of the complainants were fatal to their bill.

*the other stockholders hold, nor must it be such as operates as a fraud upon them or the creditors of the corporation.*<sup>1</sup>

**SEC. 83. Duty of Directors as to Calls.**—Where the statute imposes upon the directors the duty of making calls upon stock, or where it is vested in the stockholders, who have directed the directors to make a call, a court of equity will enforce the discharge of this duty, upon the application of any creditor or representative of creditors, or the court will itself make the call. In other words, in this respect it will do what it was the duty of the corporation to do.<sup>2</sup> But before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or some authorized demand upon him for payment; and until such order or demand is made, the statute of limitations does not begin to run thereon.<sup>3</sup> But unless the

<sup>1</sup> *Mann v. Cooke*, 20 Conn. 178; *Sawyer v. Hoag*, *ante*; *New Albany v. Burke*, *ante*; *Graff v. Pittsburgh, &c. R. R. Co.*, 31 Penn. St. 489; *Upton v. Tribilcock*, 91 U. S. 45; *Swartwout v. Michigan, &c. R. R. Co.*, 24 Mich. 389; *Mann v. Pentz*, 2 Sandf. Ch. (N. Y.) 257; *Chandler v. Brown*, 77 Ill. 333; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; *Zirkel v. Joliet Opera House*, 79 Ill. 344; *Tuckerman v. Brown*, 33 N. Y. 297; *Mann v. Currie*, 2 Barb. (N. Y.) 294; *Penobscot, &c. R. R. Co. v. Dunn*, 39 Me. 587; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *Chandler v. Brown*, 77 Ill. 333; *Snell's Case*, L. R. 5 Ch. 22; *In re London, &c. Coal Co.*, L. R. 5 Ch. Div. 525; *Levick's Case*, 40 L. J. Ch. 180; *Sidney's Case*, L. R. 13 Eq. 228.

<sup>2</sup> *Curry v. Woodward*, 53 Ala. 371; *Robinson v. Bank of Darien*, 18 Ga. 65; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 601.

<sup>3</sup> *Nimmo v. Walker*, 14 La. An. 581; *Van Hook v. Whitlock*, 3 Paige Ch. (N. Y.) 409; *Salsbury v. Black*, 6 H. & J. (Md.) 293; *Quigg v. Kittredge*, 18 N. H. 137; *Sinkler v. Indiana, &c. Turnpike Co.*, 3 Penn. 149; *Walter v. Walter*, 1 Whart. (Penn.) 292. In *Scoville v. Thayer*, *ante*, Wood, J., in passing upon the question, said: "In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made

for payment. The defendant in error owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete. But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the company and the stockholder, to the effect that the latter should not be required to make any further payments on his stock, should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done. The proceeding for an assessment in the bankruptcy court was in effect a proceeding to accomplish two purposes, first, to set aside the contract between the company and the stockholder; and, second, to fix the amount which the stockholder should be required to pay. Until these things were done the cause of action against the stockholder did not accrue, although his primary obliga-

statute so provides, it is held that neither a notice of the time and place of payment, nor a demand therefor is necessary;<sup>1</sup> nor where the

tion was assumed at the time when he subscribed the stock. It appears from the petition of the assignees, plaintiffs in error, for an assessment upon the stock of the bankrupt company, that they had used due diligence to ascertain what additional payments on the stock would be required to pay off the claims of creditors; that at as early a time as possible they applied to the court for an order directing that the stockholders should pay a part of the amount due on their shares of stock, and assessing the stock therefor; that the order was made accordingly, and within five months thereafter this action at law was begun to enforce its payment. If therefore the right to bring this suit did not accrue to the assignees until the assessment was made upon the stock by the court and the stockholders required to pay it, the action was brought long before the limitation of the statute could bar it. All the delay which has occurred has been caused by the proceedings of the assignees, taken for the benefit of the stockholders, in order that they might not be subjected to unnecessary and onerous exactions. The lapse of time between the filing of the petition for the assessment and the decree of the bankruptcy court thereon is chargeable to continuances made by order of the court and to the opposition of the stockholder referred to. It does not lie in the mouth of defendant in error to say, that while the steps necessary to fix his liability and limit its amount were being taken, the bar of the statute has intervened and cut off his liability altogether. The cases cited by the defendant in error to sustain his contention that the cause of action accrued to the assignees in bankruptcy at the time of their appointment, are clearly distinguish-

able from this. In *Terry v. Tubman*, 92 U. S. 156, the suit was by a billholder of an insolvent bank against a stockholder to enforce the individual liability of the latter to pay the bills of the bank held by the former. The court decided that the case was not so much like that of the guarantee of the collection of a debt, where a previous proceeding against the principal is implied, as it was like a guarantee of payment where resort may be had at once to the guarantor, without a previous proceeding against the principal. The conclusion of the court therefore was that the cause of action in favor of the billholder arose against the stockholder when the bank ceased to redeem its notes and became notoriously and continuously insolvent. It is clear that this authority has no application to the question in hand. The case of *Terry v. Anderson*, 95 U. S. 628, also relied on by defendant in error, was a suit in equity to enforce the individual liability of the stockholders of a bank, and to collect unpaid subscriptions to its capital stock. There was no agreement on the part of the bank not to collect the balance due on the stock. The bank itself could have enforced payment, without regard to the necessity for its collection, to satisfy the debts of the bank. And so the court held that the statute of limitations began to run against the bank and its creditors, in favor of the stockholder, when the bank stopped payment. In the cases of *Baker v. Atlas Bank*, 9 Met. (Mass.) 182, and *Commonwealth v. Cochituate Bank*, 3 Allen (Mass.), 42, also relied on by defendant in error, it appeared that upon suspension of payment by the banks there was a present and unconditional liability of their stockholders, which the court held was barred by the

<sup>1</sup> *Wilson v. Wills River R. R. Co.*, 83 Ga. 46; *Hughes v. Antistam Mfg. Co.*, 34 Md. 316; *New Albany, &c. R. R. Co. v. Pickens*, 5 Ind. 247; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; *Ross v. Lafayette, &c. R. R. Co.*, 6 Ind. 297; *Brownlee v. Ohio, &c. R. R. Co.*, 18 Ind.

68; *Johnson v. Crawfordsville, &c. R. R. Co.*, 11 id. 280; *New Albany, &c. R. R. Co. v. McCormick*, 10 id. 409; *Breedlone v. Martinville, &c. R. R. Co.*, 12 id. 114; *Macon, &c. R. R. Co. v. Vason*, 57 Ga. 314; *Lake Ontario, &c. R. R. Co. v. Mason*, 16 N. Y. 451.

charter or contract fixes the time of payment;<sup>1</sup> and in such cases the statute of limitations would begin to run from the date of the contract. But the rule is otherwise where the subscription is payable in property or labor.<sup>2</sup> If the statute so provides, notice must be given as prescribed therein; and in an action to recover the call, the complaint should contain an averment of such notice.<sup>3</sup> If the kind of notice is not specified in the statute, it has been held that a notice by publication is sufficient;<sup>4</sup> and personal notice is sufficient, although the statute provides for a different species of notice.<sup>5</sup>

limitation of six years. In the case of *Baker v. Atlas Bank*, the court said: 'The demand sought to be enforced in this suit was a debt alleged to be due to the bank. Whenever, therefore, the bank became insolvent by the loss of its capital stock, an action accrued to the bank, — according to the construction of the 30th section (Rev. Stats., ch. 36) which is contended for by plaintiff's counsel, — to recover the sum from the stockholders respectively, equal to each one's share of stock. The statute therefore began to run in strictness immediately on the loss of the capital stock, and certainly when the bank stopped payment; and after the lapse of six years from that time the debt was barred.' But in the present case, as we have seen, as between the company and its stockholders there was no obligation on the part of the latter to pay the residue of their stock, unless it became necessary to satisfy creditors. We think therefore we are safe in saying that the statute did not begin to run in favor of the stockholders until at the very least the necessity for the payment had been ascertained, and an authorized demand of payment made. It is said by defendant in error that to hold that the suit to recover the sums due on the stock held by him is not barred, would defeat the policy of the Bankrupt Act, which is a speedy settlement of the bankrupt's estate and the equitable distribution of his assets among the creditors. Unquestionably a prompt administration of the bankrupt's assets was one of the ends which the Bankrupt Act had in view; but this policy must be held to be subordinate to a just regard for the rights of both the creditors and debtors of the bankrupt estate. The debtor cannot be forced to

pay before his contract requires it, merely because the assignee may be in haste to close up the estate. If his obligation were evidenced by a promissory note due at a future day, he could not be compelled to pay it before maturity in order that the bankrupt estate might be speedily settled. So if some act must be done by the assignee, such as a demand of payment before his liability is fixed, he cannot be compelled to pay until the prerequisites have been performed. In short, until an unconditional liability to pay something is fastened on the debtor no action can be maintained against him, and the statute of limitations does not begin to run in his favor. The suggestion that the assignee may postpone indefinitely the necessary steps to fix the liability of the debtor and thus defeat the policy of the law, does not answer the proposition that the debtor cannot be sued until a cause of action has accrued against him. It is presumed that the assignee will do his duty." *Cherry v. Lamar*, 58 Ga. 541. See also *Wood on Limitations*, 326; *Curry v. Woodward*, 53 Ala. 371.

<sup>1</sup> *New Albany, &c. R. R. Co. v. Pickens*, *ante*; *Goodrich v. Reynolds*, 31 Ill. 490.

<sup>2</sup> *Ohio, &c. R. R. Co. v. Cramer*, 23 Ind. 490.

<sup>3</sup> *Mississippi, &c. R. R. Co. v. Gastner*, 20 Ark. 455; *Alabama, &c. R. R. Co. v. Rawley*, 9 Fla. 508; *Wear v. Jacksonville, &c. R. R. Co.*, 24 Ill. 593; *Spangler v. Indiana, &c. R. R. Co.*, 21 id. 276; *Sands v. Sanders*, 26 N. Y. 239.

<sup>4</sup> *Hall v. United States Ins. Co.*, 5 Gill (Md.), 484.

<sup>5</sup> *Schenectady, &c. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Lexington, &c.*

Any agreement between the corporation and the stockholder that he shall have his stock at less than par, whether under an original subscription therefor, or upon an increase of the stock, is void as against the creditors of the company; and payment of the difference between the sum paid and the par value will be enforced in equity, upon a bill filed by them or their representative or in an action at law, by an assignee in bankruptcy. Thus, in a case before cited,<sup>1</sup> subscribers to the stock of an incorporated company paid twenty per cent on their shares, and it was agreed between them and the company that no further assessments should be made thereon, and certificates for full-paid shares were issued to them. The company was adjudicated bankrupt, and it became necessary to assess the unpaid stock to satisfy claims of creditors of the company. It was held that the agreement between the company and its stockholders was in equity void as to creditors, and that before an action at law could be maintained by the assignee to recover the unpaid balance, some proceedings in equity were essential to set aside the agreement between the corporation and the stockholders, and directing the corporation to make an assessment.

**SEC. 84. Demand and Notice of Calls.** — If, as has been before stated, the statute makes provision for demand or notice of calls, its requirements in that respect must be substantially followed. If the length of notice is not stated, then *reasonable* notice must be given. If the statute provides for notice by publication in a newspaper, it is generally held that *personal* notice will suffice, if of the requisite duration, as the object of the statute, that the subscriber shall have an opportunity to meet or contest the call, is met in either case.<sup>2</sup> If the statute makes no provision for demand or

R. R. Co. v. Chandler, 13 Met. (Mass.) 311, as the statute is treated as merely directory. Mississippi, &c. R. R. Co. v. Gastner, *ante*.

<sup>1</sup> Scoville v. Thayer, *ante*.

<sup>2</sup> McCarty v. Selinsgrove, &c. R. R. Co., 87 Penn. St. 332; Unthank v. Turnpike Co., 6 Ind. 125; Macon, &c. R. R. Co. v. Vason, 57 Ga. 314; Rutland, &c. R. R. Co. v. Thrall, 35 Vt. 536; Spangler v. Indiana, &c. R. R. Co., 21 Ill. 276; Sands v. Sanders, 26 N. Y. 239; Wear v. Jacksonville, &c. R. R. Co., 24 Ill. 593. Where the charter provided that "payment of the shares of the capital stock shall be made in such sums and at such

periods as shall be fixed by the board of directors, provided that sixty days' notice be given of each call, published in at least two newspapers in South Arkansas, and one in the city of Little Rock," the giving sixty days' notice was held to be a condition precedent to the right of action by the company, but that the provisions as to the *mode* of giving notice are directory, and personal notice is sufficient. And where the declaration in such case set forth the days on which the assessments sued for were made, alleging that the defendant then had notice and was requested to make payment, it was held, on demurrer, that the court would look to

notice, none need be proved.<sup>1</sup> Thus, subscribers to the stock of a railroad company stipulated to pay the first instalment after the work should be commenced, "as shall hereafter be directed by the directors of said company." There was no stipulation for notice to the subscribers of the calling in of the instalment. It was held that no proof of notice *or demand*, other than an order passed as above, by the directors, and entered on the record-book, was necessary in a suit against a subscriber to recover the instalment.<sup>2</sup>

**SEC. 85. Rule as to Notice when neither Charter nor By-law provides for it.**—If the charter provides that the corporation may by by-law provide what notice shall be given, the fact that no such provision has been made, but that the directors voted an assessment and directed that notice should be given in a certain way, does not defeat the assessment, especially as to those stockholders who have never made any attempt to have a by-law relative to notice adopted,<sup>3</sup> the court holding, in the case last cited, that the mode of notice provided in the charter is not necessarily exclusive of all other modes. Where the statute requires that notice shall be given in a certain way, the declaration should state that such notice was given, or at least that notice was duly given as required by law,<sup>4</sup> or that the subscriber waived notice.<sup>5</sup>

**SEC. 86. Demand unnecessary, when.**—No demand for a call is required where the original agreement or the charter expressly fixes

the time of filing the declaration to ascertain whether the sixty days had expired. *Mississippi, &c. R. R. Co. v. Gastner*, 20 Ark. 455. But see *Tomlin v. Tonica, &c. R. R. Co.*, 23 Ill. 429. In a Massachusetts case, — *Jones v. Sisson*, 6 Gray (Mass.), 288, — it was held that giving personal notice of an assessment laid by a mutual fire insurance company is a sufficient publication, within the meaning of a provision in their charter, requiring an assessment to be paid "within thirty days after notice of said assessment shall have been published." But where a railroad charter authorizing the sale of the stock of delinquent subscribers required notice of the assessment to be given thirty days before the order of the directors for the sale of the shares, and that the sale should be by public auction at the post-office in C., and that the *treasurer* should give the subscribers a notice in hand *signed* by him or by a director, in his behalf, — it was

held that a notice to the subscriber in hand, not signed as required by the statute, was not sufficient. *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451. And the same rule was adopted in *Mills v. Bough*, 3 Ad. & El. N. S. 845.

<sup>1</sup> *Peake v. Wabash R. R. Co.*, 18 Ill. 88; *Fisher v. Evansville, &c. R. R. Co.*, 7 Ind. 407; *Wilson v. Wills Valley R. R. Co.*, 33 Ga. 466; *Harlem Canal Co. v. Seixas*, 2 Hall (N. Y.), 504; *Eppes v. Mississippi, &c. R. R. Co.*, 35 Ala. 33.

<sup>2</sup> *Ross v. Lafayette, &c. R. R. Co.*, 6 Ind. 297; *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 485.

<sup>3</sup> *Danbury, &c. R. R. Co. v. Wilson*, *ante*.

<sup>4</sup> *Alabama, &c. R. R. Co. v. Rowley*, 9 Fla. 508; *Mississippi, &c. R. R. Co. v. Gastner*, *ante*.

<sup>5</sup> *Rutland, &c. R. R. Co. v. Thrall*, 35 Vt. 536.

the time of payment.<sup>1</sup> But if the subscription is payable in property or work, a demand is necessary before payment can be claimed in money.<sup>2</sup> The measure of damages in an action for a call, is the amount of the assessment with interest from the time of default.<sup>3</sup>

<sup>1</sup> *New Albany, &c. R. R. Co. v. Pickens*, 5 Ind. 247; *Goodrich v. Reynolds*, 31 Ill. 490.      <sup>2</sup> *Gould v. Oneonta*, 71 N. Y. 298; *Southern, &c. R. R. Co. v. Moravia*, 61 Barb. (N. Y.) 180; *Upton v. Burnham*, 3 Biss. (U. S. C. C.) 520.

<sup>2</sup> *Ohio, &c. R. R. Co. v. Cramer*, 23 Ind. 490.



## CHAPTER V.

## PREFERRED STOCK, ETC.

SEC. 87. Form of: Right to issue.

88. Status of preferred Stockholder.

89. How Dividends must be paid on.

90. How Rights of may be enforced.

91. Shares may be attached.

SEC. 92. Increase of Stock.

93. Fraudulent, and over issue of, Stock.

94. Sales of Stock by Corporation before Incorporation.

SEC. 87. Form of: Right to issue. — Preferred or guaranteed stock is a species of stock issued by corporations which gives to its holders a priority or preference over the holders of the common stock, in the payment of dividends out of the net earnings of the corporation.<sup>1</sup> It may be said to be a species of stock devised as a substitute for any other species of obligations, to raise money for the furtherance of the enterprise, or to extinguish other outstanding obligations.<sup>2</sup> The form of these certificates is usually substantially as follows: —

## THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY.

|  |   |                         |             |            |  |
|--|---|-------------------------|-------------|------------|--|
| Countersigned and prior certificate cancelled this<br>day of<br>Secretary. | 185   | No.                     | (Vignette.) | Shares.    | Transfer made, registered this<br>day of<br>185<br>Transfer Clerk. |
|  | GUARANTEED TEN PER CENT STOCK.  |                         |             |            |  |
|  | This is to certify that<br><div style="text-align: right;">entitled to</div> shares of one hundred dollars each in the guaranteed capital stock of the Michigan Southern and Northern Indiana Railroad Company, denominated "Construction Stock." Said stock is entitled to dividends at the rate of ten per cent per annum, payable semi-annually, in New York, on the first days of June and December in each year, out of the net earnings of said company, and is also entitled to share <i>pro rata</i> with the other stock of the company, in any excess of earnings over ten per cent per annum, and the payment of dividends as aforesaid is hereby guaranteed. The said stock is transferable only on the books of the company, at their office in the city of New York, by the said stockholder, in person, or by<br><div style="text-align: right;">attorney,</div> on the surrender of this certificate. |                         |             |            |  |
|  | In witness whereof, the said company have caused the same to be registered and this certificate to be signed by their President and Treasurer, and countersigned by their Secretary.  |                         |             |            |  |
|  |   | Dated at New York, this |             | day of     | 185  |
|  |   | Treasurer.              |             | President. |  |

<sup>1</sup> West Chester, &c. R. R. Co. v. Jack-son, 77 Penn. St. 321.      Wall. (U. S.) 136; Bailey v. Hannibal, &c. R. R. Co., 17 id. 96; Totten v. Tison,

<sup>2</sup> St. John v. Erie, &c. R. R. Co. 22 54 Ga. 139.

The authority of the corporation, as is generally held, must be derived from the charter or general law, although it has been held not to be *ultra vires* for a railroad company to contract to issue preferred stock, — provided the whole number of shares does not exceed the amount authorized by the charter;<sup>1</sup> and carrying this doctrine out to its legitimate sequence, the issue of such stock would not be *ultra vires* when the corporation has authority from time to time to increase its capital stock. Indeed, inasmuch as a corporation has the power to contract debts, and to issue securities therefor, as a part of its incidental powers, it is sometimes claimed that if the power to increase the stock of the corporation is given in the charter or by the general law, it may issue this class of securities without special authority, as well as any other;<sup>2</sup> but the weight of authority seems to be to the effect that special authority is necessary, especially after the original capital has been obtained, unless the assent of the other stockholders has first been obtained. This rule is predicated upon the ground that any action of the corporation dividing the shares of stock sold, and in the hands of lawful owners into two classes, one of which has a preference over the other in sharing the earnings, injuriously affects vested rights.<sup>3</sup> But it is held that, inasmuch as

<sup>1</sup> *Hazlehurst v. Savannah, &c. R. R. Co.*, 43 Ga. 13.

<sup>2</sup> In *Harrison v. Mexican Railway Co.*, L. R. 19 Eq. 358, it was held that the power to issue this class of stock need not be expressly given, but that the power may be implied, when the language of the charter will admit of it.

<sup>3</sup> *Hoyt v. Quicksilver Mining Co.*, 17 Hun (N. Y.), 169; *Moss v. Syers*, 11 W. R. 1046; *Harrison v. Mexican R. R. Co.*, L. R. 19 Eq. Cas. 358; *Sturge v. Eastern Union R. R. Co.*, 7 De G. M. & G. 158; *Hutton v. Scarborough Cliff Hotel Co.*, 2 Dr. & S. 521; *Fielden v. Lancashire & Yorkshire Railway Co.*, 2 De G. & Sm. 531; *Matthews v. Great Northern Railway Co.*, 28 L. J. Ch. 375. *Kent v. Quicksilver Mining Co.*, 12 Hun (N. Y.), 53, was a case where a joint-stock corporation, pursuant to the provisions of its charter, established its capital at \$10,000,000, divided into 100,000 shares of \$100 each, and issued certificates therefor in the usual form. The charter in terms conferred no power to issue preferred stock. The company, however, had power to make, alter,

amend, and repeal by-laws, and to issue certificates of stock in such form and subject to such regulations as it might from time to time, by its by-laws, prescribe. It was held that while the company, under this general authority, might have had the corporate power in the first instance to provide by its by-laws for the issuing of a portion of its certificates as preferred shares, it had not power afterwards, by a vote of a majority of the stockholders, to provide that the holders of common stock might convert the same into preferred stock, entitled to certain privileges, upon payment of a specified sum. DANIELS, J., delivering the opinion of the court, states the rule thus: "Without the actual authority of law or the consent of the holders of the common shares, the power to issue preferred stock of the description of that presented in this case, does not seem to have been successfully maintained in even a single instance. And as the shares themselves are issued in a form clearly importing a right in the holder to demand and receive a corresponding portion of the net earnings of the

the holders of the common stock alone are affected by the issue of preferred stock, if they acquiesce in its issue, even though such

company, it cannot consistently be held that he can be deprived, without his own consent, of that right by the combined act of the directors and other shareholders in the corporation. If that could be done, corporations would be enabled, under the sanction of the law, to perpetrate the most gross frauds; for they could receive the subscriber's money, ostensibly and expressly for one thing, and afterwards deprive him of its substantial benefit, by converting it into another, entirely different, and of inconsiderable value. Persons do not subscribe for, nor deal in, the stock of corporations upon any such understanding. They proceed upon the expectation, justified by law, that the shares they have shall not be destroyed by giving others a preference over them, without first obtaining their consent, — where no power of that nature has been created by statute, or reserved to be exercised afterwards by the corporation itself. Property of this description is protected from spoliation by the same safeguards as have been devised for the preservation of the interest of the owner in that of a more tangible character. He cannot be deprived of it contrary to the essence of the contract creating it, or without his expressed or implied consent." The case of *Hoyt v. Quicksilver Mining Co.*, 17 Hun (N. Y.), 169, is part of the same general litigation. The decision of the General Term of the second department seems to be based upon ratification and acquiescence. It is only in the dissenting opinion of GILBERT, J., that the principles governing the power to issue preferred stock are considered. In *Kent v. Quicksilver Mining Co.*, 78 N. Y. 152, FOLGER, J., in passing upon this question, said: "This corporation was in need of money to carry on its authorized business. It did get money for that purpose, and because of that need obtained it from some of the stockholders; and in that instance from some of them alone. If the mode by which that money was got was a borrowing, within the sense which the law and common acceptance give to that term, then the transaction so far would have been lawful; and it would have re-

mained to inquire, whether the obligation given was a lawful instrument. But it was not a borrowing. The idea of a borrowing is not filled out, unless there is in the agreement therefor a promise or understanding that what is borrowed will be repaid or returned, — the thing itself, or something like it of equal value, — with or without compensation for the use of it in the mean time. To borrow is the reciprocal action with to lend; and to lend, or to loan, say the dictionaries, is the parting with a thing of value to another for a time fixed or indefinite, yet to have sometime an ending, to be used or enjoyed by that other, — the thing itself, or the equivalent of it, to be given back at the time fixed, or when lawfully asked for, with or without compensation for the use, as may be agreed upon. In this transaction with some stockholders, that corporation had not the right, nor was it under the liability, to ever pay back the five dollars per share furnished by them to it; that was not named in the terms of the obligation given, nor was it contemplated in the negotiation and bargain. The stockholder had not by the scope of his bargain, nor by the terms of the written evidence of it, any right ever to ask for repayment of the money furnished by him. In short, there was not proved thereby the relation of debtor and creditor. The stockholder parted forever with the money furnished, inasmuch as the charter of the company is perpetual, and the company made a perpetual charge upon its net earnings. Though there was a compensation fixed for the use of the money, and though it was to take the form of a yearly payment, and at a rate the same as the then lawful rate of interest, yet we cannot conceive that the transaction was a loan and borrowing of money, with a compensation for the use of it. If it had been, though the compensation was great for the sum furnished, yet it was not a violation of the many laws of which the corporation could avail itself. Laws of 1850, chap. 172. And the courts might not overhaul it, save, perhaps, as an unconscionable and extortionate agreement, — 1 Story's Eq. Juris.

acquiescence is evidenced only by their failure to take proper legal steps to have the stock invalidated, for an unreasonable period, they

§§ 246-331, — as to which we will speak again before the close. The transaction is not to be looked upon as other than a preference of one class of stockholders to another, as giving to the first class a perpetual, inextinguishable prior right to a portion of the earnings of the company, before the other class might have anything therefrom. It was none other than the creation of a 'preferred stock.' Then there arises the query, whether there was at that time power in the corporation to distinguish between the stockholders in it, to form them into two classes, and to give to one class rights in the corporate property, business, and earnings, from which the other was shut out. We are not prepared to say that, at the first, the corporation might not have lawfully divided the interest in its capital stock into shares arranged in classes, preferring one class to another in the right it should have in the profits of the business. The charter gave power to make such by-laws as it might deem proper, consistent with constitution and law, and to issue certificates of stock representing the value of the property. We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions thereto. No rights are got until a subscription is made. Each subscriber would know for about what class of stock he put down his name, and what right he got when he thus became a stockholder. There need be no deception or mistake, there would be no trenching upon rights previously acquired; no contract, express or implied, would be broken or impaired. This corporation did otherwise: a by-law was duly made, which declared the whole value of its property, and the whole amount of its capital stock, and divided the whole of it into shares equal in amount, and directed the issuing of certificates of stock therefor. It is not to be said that this by-law authorized anything but shares equal in value and in right; or that the taker of one did not

own as large an interest in the corporation, its capital, affairs, and profits to come, as any other holder of a share. Certificates of stock were issued under this by-law, that gave no expression of anything different from that. When that by-law was adopted, it was as much the law of the corporation as if its provisions had been a part of the charter. *Presbyterian Church v. City of New York*, 5 Cow. (N. Y.) 538. So it is said in *Grant on Corporation*, page 80, in a qualified way. Thereby, and by the certificate as between it and every stockholder, the capital stock of the company was fixed in amount, in the number of shares into which it was divisible, and in the peculiar and relative value of each share. The by-law entered into the compact between the corporation and every taker of a share; it was in the nature of a contract between them. The holding and owning of a share gave a right which could not be divested without the consent of the holder and owner; or unless the power so to do had been reserved in some way. *Mech. Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599-627. Shares of stock are in the nature of *choses in action*, and give the holder a fixed right in the division of the profits or earnings of a company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened, against the will of the owner, than can any other right, unless power is reserved in the first instance, — when it enters into the constitution of the right; — or is properly derived afterwards from a superior lawgiver. The certificate of stock is the muniment of the stockholder's title and evidence of his right. It expresses the contract between the corporation and his co-stockholders and himself; and that contract cannot, he being unwilling, be taken away from him, or changed to him, without his prior dereliction or under the conditions above stated. Now it is manifest that any action of a corporation which takes hold of the shares of its capital stock already sold, and in the hands of lawful owners, and divides them into two

are bound by their acquiescence, and cannot afterwards take measures to procure the cancellation of the stock. Thus, in a New York

classes, one of which is thereby given a prior right to a receipt of a fixed sum from the earnings before the other may have any receipt therefrom, and is given an equal share afterwards with the other in what earnings may remain, — destroys the equality of the shares, takes away a right which originally existed in it, and materially varies the effect of the certificate of stock. It is said that when a corporation can lawfully buy property, or get money on loan, any known assurance may be exacted and given which does not fall within the prohibition express or implied of some statute, — *Curtis v. Leavitt*, 15 N. Y. 7, — and that is sought to be applied here. But the prohibition to such action as this is found, not indeed, in a statute commonly so called, but in the constitutional provision, which forbids the impairment of vested rights save for public purposes and on due compensation. The right which a stockholder gets on the purchase of his shares and the issue to him of the certificate therefor, is such a vested right. It is contended that the power so to do is an incidental and implied power, necessary to the use of the other powers of the corporation; and is a legitimate means of raising money and securing the agreed consideration therefor. We have already conceded that it is legitimate to borrow money and to secure the repayment of it, with a compensation for the use of it. But that is when it is done in such ways as to put the burden upon all, — every share of stock alike, — and to enable every share of stock to be relieved therefrom alike; in such way as to preserve the equality of right and privilege and value of the shares, and maintain intact the contract thereto with the stockholder. Citations are made to us for the converse of this, but they do not come up — sometimes in their facts, sometimes in their declarations — to the necessity of the proposition. Either it is where the capital is not limited, and it is new shares that may be issued with a preference, and where there is express power to borrow on bond and mortgage; 2 Redf. on Railways, ch. xxxiii., sect. iv., p. 237; Har-

rison v. R. W. 12 Eng. Rep. 793; or, the amount of the capital has not been reached, and such stock is issued therefrom; *Hazlehurst v. Savannah R. R. Co.* 43 Ga. 13; *Totten v. Tison*, 55 ib. 139; or, there was legislative authority; *Davis v. Proprietors*, 8 Met. (Mass.) 32; *Rutland R. R. Co. v. Thrall*, 35 Vt. 545; or, a restriction to authorized capital, and there was unanimous consent of the stockholders; *Prouty v. M. S. & N. I. R. R.* 1 Hun (N. Y.), 665; 43 Ga. *supra*; or, there was power to redeem, which was a transaction in the nature of a debt; *West Chester, &c. R. R. Co. v. Jackson*, 77 Penn. St. 321; or, the opinion was *obiter*; *Bates v. Androscoggin R. R. Co.*, 49 Me. 491; or, it was the case of a subscription for stock, with a condition for interest until the corporation was in operation; *Richardson v. Vt. & Mass. R. R. Co.*, 44 Vt. 613; or, it was an action on a subscription more favorable to defendant than to other subscribers, and it was held that defendant could not set up the lack of equality; *Evansville R. R. Co. v. Evansville*, 15 Ind. 395; or, a solemn determination of this question was not necessary for the disposal of the case; *Williston v. M. S. & N. I. R. R. Co.*, 13 Allen (Mass), 400; or, the issue was authorized by the articles of association; *in re A. D. St. Nav. & Col. Co.*, 20 L. R. Eq. 339; or, there was full knowledge on the part of all concerned; *Lockhart v. Van Alstyne*, 31 Mich. 81; or, the power in the corporate body was conceded, and it was denied that it existed in the directors; *McLaughlin v. D. & M. R. R.*, 8 ib. 100. We will not say, for we are not called upon here to say, that never can a corporation rightfully, against the dissent of a portion of its stockholders, make some of the stock preferred; what we assert is that this case does not present a state of facts in which a power so to do exists. There is a power in this charter to alter, amend, add to, or repeal at pleasure by-laws before made. It is argued from this that it was in the power of the corporate body, in due form and manner, to alter the by-law which had fixed the amount of the capital stock, and the num-

case,<sup>1</sup> a corporation was authorized by its charter to issue certificates of stock representing the value of the property, in such form and subject to such regulations as they might by their by-laws from time to time prescribe. The company bought property of the value of \$10,000,000, and issued stock to that amount. Subsequently, February 24, 1870, desiring to raise money, it was resolved at an annual meeting of stockholders, by the unanimous vote of 75,658 shares, that certificates of stock upon which five dollars per share should be paid within a time limited, should be preferred shares, and should be entitled to interest at the rate of seven per cent per annum, to be paid annually out of the net earnings of the company, any surplus remaining to be divided *pro rata* among the holders of preferred and common stock. In pursuance of this resolution the owners of 42,913 shares of common stock exchanged them for a corresponding number of preferred shares. Since April, 1870, the capital stock has been represented by such preferred shares and the balance of the shares unexchanged of the common stock, and frequent transfers of both kinds

ber and relative value of the shares thereof. The power to make by-laws is to make such as are not inconsistent with the constitution and the law, and the power to alter has the same limit; so that no alteration could be made which would infringe a right already given and secured by the contract of the corporation. Nor was the power to alter, to the extent of affecting the contracted relative value of a share, reserved when the share was sold to the stockholder, so as to enter into and form part of the contract. An alteration is a *pro tanto* repeal, but no private corporation can repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-law afterwards repealed. All by-laws must be reasonable and consistent with the general principle of the laws of the land; which is to be determined by the courts when a case is properly before them. The Master, &c. v. Green, 1 Ld. Kenyon, 113. A by-law may regulate or modify the constitution of a corporation, but cannot alter it. Rex v. Cutback, 4 Burr, 2204; R. W. Co. v. Allerton, 18 Wall. 233. The alteration of a by-law is but the making of another upon the same matter. If the first must be reasonable and in accord with principles of law, so must that which alters it.

If, then, the power is reserved to alter, amend, or repeal, and that reservation enters into a contract, the power reserved is to pass reasonable by-laws agreeable to law. But a by-law that will disturb a vested right is not such. See Gray v. Portland Bank, 3 Mass. 363; Grant on Corporations 91. And it differs not when the power to make and alter by-laws is expressly given to a majority of the stockholders, and that the obnoxious ordinance is passed in due form. It needs not that we consider the position, that the issue of the preferred stock was an authorized increase of the capital, and so legal. It did not profess to be, nor was it in fact. For each share of preferred stock given out a share of common stock was taken in, so that the gross amount of the capital stock was still the same, and so were the number of shares and the nominal value of each share. We are, therefore, of the opinion, that there was no power in the corporate body, nor in a majority of the stockholders, to provide by by-law for the creation of a preferred stock so as to bind a minority of the stockholders not assenting thereto."

<sup>1</sup> Hoyt v. Quicksilver Mining Co., 12 Hun, 169.

of stock have been made, and such shares have been bought and sold in open market as common and preferred stock, the latter always at the higher price. The amount realized by the transfer of the common into the preferred shares was expended in the current expenses of the company. At the annual meeting of the stockholders, February 24, 1874, a resolution was passed authorizing the holders of the rest of the common stock to convert it, upon the payment of five dollars and interest from February 24, 1870, into preferred stock.

November 24, 1874, an action was brought by a stockholder against the company, and others, — a majority of the board of directors and large owners of its common stock, — in which it was decreed that the preferred stock issued under the resolution of February 24, 1870, was valid against the owners of the common stock who had assented to the preference or ratified the same, or had become estopped by their acts from disputing it, and that against such stockholders the company was bound to carry out the contract of preference. The judgment also restrained the issue of more preferred stock.

Prior to November 16, 1877, no action had been taken to restrain the issue of the preferred stock or have it declared invalid, or prevent the carrying out of the contract of preference; nor previous to the stockholders' meeting of February, 1874, was any written protest or any serious objection made to said preferred stock. November 16, 1877, an action was brought by the holder of certain shares of common stock, asking that the preferred stock be adjudged to be void. It was held, that as to the parties representing the shares of stock voting in favor of the resolution giving the preference, at the meeting of February 24, 1870, the preference was valid and binding, and that in respect to the holders of the balance of the common stock, their subsequent acquiescence deprived them of the right to object to such preference, to the same extent that their previous assent thereto would have done. Also, that if such holders of the common stock had intended to raise any objections, it was incumbent upon them to do so promptly, and not allow the public to deal in the preferred stock under the belief, engendered by their silence, that no objection would be made to its validity. While the mere lapse of time will not show knowledge, yet where it would be inequitable under the circumstances of the case to allow a stockholder, after a great lapse of time, to set aside a transaction where money realized therefrom has been used by the company, it will be imputed to him.

SEC. 88. **Status of Preferred Stockholders.** — Although preferred stock is issued to secure a debt existing against the corporation, yet by accepting it, the debt is extinguished, and the person so accepting it ceases to be a creditor, and takes the position of a stockholder in the corporation, with all the rights incident thereto, and the added advantage of being entitled to priority in receiving the dividends stipulated for in his certificate, before any dividends can be paid to the holders of the common stock.<sup>1</sup> They do not acquire any rights

<sup>1</sup> *St. John v. Erie R. R. Co.*, 22 Wall. (U. S.) 136. In *Chaffee v. Rutland R. R. Co.*, 55 Vt. 184, it appeared that there were two mortgages on the R. & B. R. Co., and that it was being operated by the trustees of the second-mortgage bondholders, and that a suit was pending to foreclose the first mortgage, and that during the pendency of this suit a charter having been obtained for the defendant company in the interest of the second-mortgage bondholders, the defendant, by corporate vote, under the authority of the charter, issued \$4,300,000 of "preferred or guaranteed stock, commonly called preferred guaranteed stock," also \$2,500,000 of common stock, to liquidate the first mortgage bonds and other claims resting on the property. The charter provided that the said guaranteed stock should "be entitled to receive dividends from the earnings and income of the corporation;" that it "shall pay and shall be liable to pay such dividends;" that "until declared, interest shall be added to each dividend;" and that no dividend should be paid on the common stock "until a dividend is made on said preferred stock." The defendant having issued certificates of "scrip dividends" in "settlement of dividends" on the said preferred stock, in an action of assumpsit to recover the amount of some of said certificates, it was held that a preferred stockholder is not a creditor; that a creditor's lien is prior to the right of a stockholder; that a right to a dividend is not a debt; that dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends; that a stockholder is not entitled to any dividend of the profits until all the debts are paid; that the stock and property of a corporation is

a trust fund pledged for the payment of its debts; and that there is no right to declare a dividend until there is a fund from which it can properly be made. The court said, "The construction of similar provisions has not unfrequently been involved in causes in this country and in England, and the struggle has been to gain for the preferred guaranteed stockholders the double advantage of a shareholder and creditor, but without success. The legislation in Vermont and elsewhere has been in accord with the idea developed in the reported cases, that the stock and property of a corporation is a trust fund pledged for the payment of its debts; and the creditors' right to payment and their lien is prior to the right of every stockholder. In *National Bank v. Douglass*, 1 McCrary (U. S. C. C.), 86, the court say, quoting the language of CLIFFORD, J., in *Railroad Co. v. Howard*, 7 Wall. (U. S.) 392, that 'stockholders are not entitled to any share of the capital stock, nor any dividend of the profits, until all the debts of the corporation are paid.' To similar purport and equally strong is the language of STORY, J., in *Wood v. Dummer*, 3 Mas. (U. S.) 308; and again in *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 286, and of CURTIS, J., in *Curran v. State*, 15 How. (U. S.) 304. It is now well established that dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends; and that such dividends are not payable absolutely and unconditionally, as interest is, but only out of profits made by the company. The preference is limited to profits whenever earned. *Corry v. Railroad Co.*, 29 Beav. 263; *McGregor v. Insurance Co.*, 33 N. J. Eq. 181; *St. John v. Erie R. R. Co.*, 10 Blatch. (U. S. C. C.) 271; s. c., 22 Wall.



in the property of the company superior to the claims of subsequent creditors. Thus, in a case before the United States Supreme Court<sup>1</sup>

(U. S.) 136; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Taft v. Railroad Co.*, 8 R. I. 310. But the company having issued the certificates without objection by any stockholder or creditor, which certificates were convertible into the company's bonds on demand or at the option of the holder; and having converted all or nearly all of the certificates into bonds, except the plaintiffs; having ratified them, and never having denied their validity, and having so acted that it is estopped to deny their validity, — general assumpsit will lie to recover the amount of the certificates, the company on demand having refused either to convert them into bonds or to pay them; and this is so, although at the time the scrip dividends were issued the net earnings were insufficient to pay them, the current expenses, and the floating debt of the company, said debt having been very largely reduced when the action was brought, and it not appearing that the same treatment of the plaintiff's certificates with the others would have embarrassed the company. Having issued the certificates, ratified them, and all the other preferred stockholders having received the fruits thereof, the company itself cannot plead its own wrong in defence by showing that they were illegally issued, or that it had no authority to exchange bonds for certificates, it not appearing that this was necessary to protect itself from embarrassment, or creditors from loss. In *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542, it was held, in an action against the corporation by a stockholder to recover a dividend declared by the directors, that if all the other stockholders have received and retain their dividends, the corporation cannot set up in defence that the dividend has not been earned, and that its payment would withdraw a part of the capital. *Kent v. Quicksilver Mining Co.*, 78 N. Y. 186. 'If the power to make the contract exists, an excess in some particulars is not a defence.' In *Taylor v. Chichester & M. Railw. Co.*, L. R. 2 Exch.

356, 378, BLACKBURN, J., says: 'I think it very unfortunate that the same phrase of *ultra vires* has been used to express both an excess of authority as against the shareholders, and the doing of an act illegal as being *malum prohibitum*, for the two things are substantially different; and I think the use of the same phrase for both has produced confusion.' It is ordinarily a matter of internal management, to be determined by the company or the directors, when to declare dividends and the amount. This is subject to limitations, and equity will interfere either to enforce or restrain a dividend upon sufficient showing. *Green's Brice's Ultra Vires*, 2d Am. ed. 202. But equity even would not interfere with a dividend, unless it appeared that somebody in particular was hurt or liable to be injured. It would not interfere after all danger had passed, and for the sake of vindicating general principles. *Stevens v. South Devon R. Co.*, 9 Hare, 313; *Browne v. Monmouthshire R. Co.*, 13 Beav. The plaintiff was a stockholder, and so affected to a certain extent by constructive notice of the acts of the company and its officers, but in fact had no part in what was done; and hence stands in no such equal fault as to warrant a denial of remedy. The certificates ran to the holder, went on the market, were purchased by the plaintiff; and the defendant had always treated him as though an original holder, and the certificates as running to bearer. It was held that the plaintiff could sustain the action in his own name; and that it was not a question of negotiability, but how the defendant had treated the certificates, etc. All the issues of certificates were authorized by nearly, if not entirely, unanimous votes of the corporation, followed by votes of the directors. They were issued from time to time from 1872 to 1875 inclusive. The company never denied, but always recognized their validity by its corporate action, the repeated votes of its stockholders and directors,

<sup>1</sup> *Warren v. King*, U. S. S. C. (1883).

certificates of preferred stock of the Ohio and Mississippi Railway Company were issued containing the following language: "The preferred stock is to be and remain a first claim upon the property of the company, after its indebtedness; and the holder thereof shall be entitled to receive from the net earnings of the company seven per cent per annum, payable semi-annually, and to have such interest paid in full, for each and every year, before any payment of dividend upon the common stock; and whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock, shall be more than sufficient to pay both said interest of seven per cent on the preferred stock in full, and seven per cent dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings, after such payments, shall be divided upon the preferred and common shares equally, share by share." It was held that the preferred stockholders had no claim on the property superior to that of creditors under debts contracted by the company subsequently to the issue of the preferred stock, and that their only valid claim was one of priority over the holders of common stock.<sup>1</sup>

**SEC. 89. How Dividends must be Paid on.** — The holders of preferred stock, upon which a certain dividend is payable, are only entitled to dividends out of the earnings of the company, which are legally applicable to the payment of dividends whether the certificate so provides or not;<sup>2</sup> and the net earnings of any year may be applied

the representations of its officers authorized to issue them, and by the issuing of new bonds, even after the bringing of this suit, to take up the certificates; and it was held that it was a ratification, and that the defendant was estopped from denying their validity. The last two issues of certificates did not contain the convertibility clause; but they had always been converted into bonds the same as the earlier numbers, and the president of the defendant, the officer who had charge of converting them, told the plaintiff, before he purchased, that they were convertible into bonds, and showed him the stockholders' vote to that effect." It was held that they should be treated the same as the other certificates and the company could not deny the consideration in the certificates, having always treated them as though given in surrender of a dividend actually earned and warranted, and issued

in settlement of dividends. *Hayward v. Pilgrim Society*, 21 Pick. (Mass.) 276; *Blake v. Peck*, 11 Vt. 483; *Cross v. Richardson*, 30 id. 641; *Miller v. Emans*, 19 N. Y. 384; *Plank Road Co. v. Payne*, 17 Barb. (N. Y.) 567; *Chaffee v. Rutland R. R. Co.*, 55 Vt. 184.

<sup>1</sup> *Nickolls v. New York, Lake Erie, & Western R. R. Co.*, 15 Fed. Rep. 575. In this case, the directors had reported an accumulation of profits more than sufficient to pay the dividends on the preferred stock, but had determined to use it for the improvement of the road. It was held that the preferred stockholders could compel its application to the payment of the dividend.

<sup>2</sup> *Taft v. Hartford, P. & F. R. R. Co.*, 8 R. I. 310; *Bates v. Androscoggin, &c. R. R. Co.*, 49 Mo. 491; *Union Pacific R. R. Co. v. United States*, 99 U. S. 402.

to that purpose;<sup>1</sup> unless, as is sometimes the case, the agreement confines the right to such dividends to the earnings of the current year;<sup>2</sup> and if there is a deficiency in the earnings of any one year to pay such dividends, they are payable out of the net earnings for the next year or years; and the holders of common stock are not entitled to dividends until the full amount of accrued dividends on the preferred stock are paid; and if the company declares a dividend upon the common stock out of earnings which should be applied to the payment of such deficiency, its payment will be enjoined.<sup>3</sup>

If the net earnings have been in part appropriated to the payment of dividends upon the common stock, the holders of the preferred stock will be entitled to interest upon accrued dividends from the time of such appropriation.<sup>4</sup> But as such dividends can only be paid out of net earnings, they are not debts of the corporation,<sup>5</sup> and

<sup>1</sup> *Prouty v. Michigan Southern, &c. R. R. Co.*, 1 Hun (N. Y.), 655.

<sup>2</sup> *St. John v. Erie R. R. Co.*, 22 Wall. (U. S.) 136.

<sup>3</sup> *Union Pacific, &c. R. R. Co. v. United States*, 99 U. S. 402; *Taft v. Hartford, &c. R. R. Co.*, 8 R. I. 310; *Burt v. Rattle*, 31 Ohio St. 116. *Id.* After the issue of common stock by a railroad company, a supplement to its charter was passed, which authorized the issue of preferred stock on the following conditions: "That when so issued, . . . the holders thereof, respectively, shall be entitled to receive dividends on the same, not to exceed seven per cent per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company." In some years dividends of seven per cent or less were declared on the preferred stock alone, and in other years such dividends were declared on both the preferred and common stock. It was held that a holder of the preferred stock was not entitled to annual dividends thereon at a fixed rate, but only to dividends out of the annual profits; but when such profits had been earned, he was entitled to a dividend of seven per cent therefrom, before any dividend could be paid on the common stock; and that the fact that a holder of stock failed to assert his rights to a dividend in any one year did not prevent a subsequent owner of the stock from claiming reimbursement.

*Elkins v. Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 233; 9 Am. & Eng. R. R. Cas. 639. In *Bates v. Androscoggin, &c. R. R. Co.*, 49 Me. 491, preferred stock was issued with the following condition: "So much of the net earnings of the road as may be necessary, after paying interest to the bondholders, shall be applied to the payment of twelve per cent, in semi-annual dividends of six per cent each, to the holders of stock hereby created, until the net earnings shall be sufficient to pay an interest of six per cent on the stock, and all the bonds issued on the first and second loans." It was held that these payments depended on no contingency, except that the net earnings of the road, after paying the interest on the bonded debt, should be sufficient to pay them; and in estimating the time when the earnings have reached that amount, an entire year should be considered, and not six months; consequently, that a person who sold his stock before the close of the year, could recover no part of the dividend, although the transfer was not recorded.

<sup>4</sup> *Prouty v. Michigan Southern R. R. Co.*, 6 T. & C. (N. Y.) 230; 1 Hun (N. Y.), 655; *Sturges v. Eastern Union R. R. Co.*, 7 De G. M. & G. 158; *Boardman v. Lake Shore, &c. R. R. Co.*, 84 N. Y. 157; *Henry v. Great Northern R. R. Co.*, 4 K. & J. 1.

<sup>5</sup> *Chaffee v. Rutland R. R. Co.*, 55 Vt. 110. But if a bond and mortgage is given

consequently, until such net earnings properly applicable to the payment of dividends have accrued, it follows as a matter of course that interest is not chargeable upon such dividends, because no debt has been created against the company. But when the net earnings are such that a dividend can properly be applied upon such stock, and the company refuses so to apply it, or appropriates it for dividends upon the common stock, the holders of the preferred stock may not only compel its application towards the liquidation of the dividends upon their stock, but are also entitled to interest.<sup>1</sup>

to secure such certificates, the holders thereof are to be treated as creditors. Thus in *Burt v. Rattle*, 31 Ohio St. 116, where a manufacturing corporation, professing to act under the Ohio act of 1870, providing for issuance of preferred stock to pay debts, issued certificates of preferred stock, so called, certifying that the corporation guaranteed to holders the payment of four per cent semi-annual dividends, and the final payment of the entire amount at a specified time, with the right to convert the preferred stock into common stock; and the company, at the same time, executed and delivered to a trustee its bond and mortgage, to secure the holders of such certificates; and it was held that the holders of the certificates did not thereby become stockholders or members of the corporation, but its creditors; and that, as such creditors, they had a lien upon the mortgage property superior to that of general creditors of the corporation, or of its assignees. When a cash dividend is voted for the purpose of paying for new stock to be issued to stockholders, the whole transaction constitutes in fact a stock dividend; and if the issue of stock is illegal the cash dividends will fail also. *Rand v. Hubbell*, 115 Mass. 461.

<sup>1</sup> *Boardman v. Lake Shore, &c. R. R. Co.*, 84 N. Y. 157. A railway company issued stock; becoming embarrassed, a statute was enacted, in 1855, authorizing it to complete its road, etc., to issue preferred stock, the holders to receive a dividend of eight per cent from the time of payment therefor before the other stock; the dividend to be paid only out of the net earnings of the line. Other laws authorized the issue of a "consolidated preferred stock," to retire the stock there-

fore issued; the holders to receive eight per cent from July, 1872, before any other stock should receive a dividend. "Consolidated" stock was issued, which was used in retiring all other stock except forty-two shares of the "preferred" stock. In July, 1873, a dividend was declared on the "consolidated" and "preferred" stock as it should then stand on the books, payable out of the earnings of the road for the two preceding years. It was held that the owners of the forty-two shares of "preferred" stock were entitled to a dividend of eight per cent per annum from the time of payment for it in 1855, the whole amount of dividend declared being sufficient for that purpose. *West Chester & Philadelphia R. R. Co. v. Jackson*, 77 Penn. St. 321. In *Prouty v. Michigan Southern R. R. Co.*, 1 Hun (N. Y.), 655, the defendant, in 1857, issued certain preferred stock, entitled to dividends of ten per cent per annum, payable semi-annually, out of the net earnings of the company. No dividends were paid thereon until 1863, and then no payment was made of the dividends in arrears. An action was brought to recover those arrears, which was upheld, — *DANIELS, J.*, in the course of a very able opinion, among other things, saying: "It becomes necessary to consider whether the holders of it (the preferred stock) are entitled to their stipulated dividends out of the net earnings of the company for years succeeding those in which, by the terms of the certificates, they were rendered payable. The circumstances existing at the time when the stock was provided for and issued, and which may properly be considered in its construction, warranted the expectation that the dividends, rendered payable on the first days

**SEC. 90. How Rights of Holders of may be Enforced.**—The rights of such stockholders may be enforced in courts of equity,<sup>1</sup> or, according

of June and December of each year, by the terms of the certificates, could not be paid in the financial condition in which the company then was; for its floating debt was larger than the amount which could be realized from the sale of the preferred stock created for its payment, on the terms upon which it was offered to the stockholders of the company. It was reasonably to be inferred, therefore, that there would not at once be any fund available for the payment of the stipulated preferred dividends, inasmuch as the earnings of the company would probably be all required for the payment of its floating and pressing indebtedness. So that it could hardly have been the design of the corporation, in issuing the certificates for the guaranteed stock, to limit their holders' right to dividends to the net earnings of the year, in which it was agreed the stipulated distribution of them should be made. The language used in the certificates embodies the same conclusion. For, while the ten per cent dividends are expressly made payable out of the net earnings of the company, it is also agreed by the guaranty following, that the dividends shall be paid in that manner. The undertaking is explicit, that the holders of the stock shall receive their annual ten per cent out of the company's net earnings. It was clearly designed that they should have that amount for each year upon their investment. And as they could receive it only from the net earnings of the company, and it was certainly intended they should have ten per cent per annum, at least, upon the investment, if those earnings proved insufficient for the payment at the times mentioned in the certificates, it must have been designed that they should be afterward paid, whenever the net earnings of the company would permit that to be done. There could have been no other or different object for the positive stipulation, that the holders of the stock should receive ten per cent per

annum for their money. Although an investment in stock, it was substantially a loan to the company, to relieve it from pressing necessities. And it could hardly have been induced, under the circumstances, on terms as favorable to the borrower, without the guaranty that all the net earnings were rendered liable for the payment of the annual dividends mentioned in the certificates. And by that, the company positively agreed that they should be so paid. Its apparent object was to render the ultimate payment uncontingent, whenever the net earnings proved sufficient to enable the company to make it. That, though not in the express terms of the certificate, is its import and spirit. And it must have been so understood by the persons purchasing the stock. They had the right to assume that to be the character of the obligation created by it, and the company should be held to its performance in that way. In substance, it constituted a pledge of the future net earnings of the company for the payment of the yearly ten per cent dividends. That was its main expectation and purpose. It is true that, by its terms, it contemplated the creation of a sufficient fund to enable the company to pay during each year. But, if that expectation failed, nothing was inserted in the certificate discharging the company from all future obligation of payment when the fund should be sufficient to make it. The stipulations for the payment, and the guaranty that the dividends should be paid out of the net earnings, as stipulated, are consistent with the existence of no other design than that the holders of the preferred shares should receive their ten per cent per annum in case the net earnings proved equal to that end. The holders were given an interest in the clear profits of the company, equal to the ten per cent which it was agreed they should receive from that source. The dividends mentioned are

<sup>1</sup> *St. John v. Erie R. R. Co.*, *ante*; *ante*; *Bailey v. Hannibal & St. Joseph R. R. Co.*, 13 Wall. (U. S.) 136.

to some of the cases, in a court of law.<sup>1</sup> These shares take numerous forms, according to the needs or the views of the corporation, and the *agreeing* words therein of course determine the relative rights of the parties; but as a rule, they will be found to be nothing more than mere shares of stock, giving the holder a priority of dividends, but not of assets or capital, as to which they stand in no better position than other stockholders.<sup>2</sup> As the holders of these shares are not creditors, even as to dividends in arrears, except as has been before stated, it follows that they can, as to the general assets of the company, rank only as ordinary stockholders. After what has been said as to the qualities and character of this stock, it is almost needless to say that the dividends can only be paid out of the net earnings or profits; and any agreement to the contrary would be *ultra vires*,<sup>3</sup> and void as being opposed to public policy.<sup>4</sup> The question as to whether the company can pay a dividend upon preferred stock out of

payable, generally, out of the net earnings of the company. And it would be doing more than what it was agreed should be done, if the court should limit the right to payment to the earnings of any one particular year. The substantial obligation of the corporation was to pay ten per cent per annum on the stock out of the net earnings of the company. And the days on which the dividends were to be made, were alone contingent upon its ability to make them. The failure, for want of net earnings, to make the dividends on those days did not exonerate the corporation from the general and paramount obligation to make them when the earnings necessary for that purpose should afterwards be realized.

"A somewhat similar point was presented for the construction of an act of Parliament providing for preferred stock, in the case of *Henry v. The Great Northern Railw. Co.*, 1 De G. & J. 606; 3 Jur. n. s. 1133; 58 Eng. Ch. 605. There was no obligation to make payment of the stipulated dividends at any particular time, in that case, beyond what might be inferred from the undertaking that they should constitute a particularly specified sum per year. It could reasonably be inferred from that circumstance that the obligation at least existed, to make the dividends annually. For that was the apparent purpose of the defendant, according to the form

and import of the stock issued. But the court held that the earnings out of which they were expected to be made, were not realized during the year in which, by the terms of the stock issued, they ought to have been paid. On the contrary, the stock was held to be a charge 'on all accruing profits, at the stipulated rate, before anything is divided among the ordinary shareholders.' This is substantially interest, chargeable exclusively on profits. A similar conclusion was maintained in *Taft v. The Hartford, Providence, & Fishkill R. R. Co.*, 8 R. I. 310, where the action failed because no net earnings had been received. See also *Crawford v. North Eastern Railway Co.*, 3 Jur. n. s. 1093; *Stevens v. South Devon Railway Co.*, 9 Hare, 313." *Lindley on Partnership* (2d ed.) 781.

<sup>1</sup> *West Chester, &c. R. R. Co. v. Jackson*, 77 Penn. St. 321; *Bates v. Androscoggin, &c. R. R. Co.*, 49 Me. 491.

<sup>2</sup> *In re London India Rubber Co.*, L. R. 5 Eq. 519.

<sup>3</sup> *Pittsburgh, &c. R. R. Co. v. Alleghany Co.*, 68 Penn. St. 126. And this is the case as to all dividends, unless there is express authority to do otherwise. *Miller v. Pittsburgh, &c. R. R. Co.*, 40 Penn. St. 237; *Painesville, &c. R. R. Co. v. King*, 17 Ohio St. 534.

<sup>4</sup> *Lockhart v. Van Alstyne*, 31 Mich. 76.

the net earnings of any one year, is for the court, and the decision of the directors is not, as is the case as to the common stock, conclusive.<sup>1</sup>

The holders of preferred stock are first entitled to the dividend named in their certificate, out of the earnings of each year, and then the common stock is entitled to a dividend from the surplus if any, not exceeding the amount per cent paid upon the preferred stock; and if there still remains a surplus, it is to be applied equally as a dividend upon the common and preferred stock.<sup>2</sup>

**SEC. 91. Shares liable to Attachment and Levy.**—Shares in corporations are generally liable to attachment, and sale upon execution, the statutes of the several States making provisions for subjecting them to liability for debts, which method must be adopted,<sup>3</sup> and the purchaser of such shares upon execution sale succeeds to all the rights of the shareholder therein, and becomes subject to all his liabilities.<sup>4</sup> In New York<sup>5</sup> it has been held that a corporation

<sup>1</sup> *Bailey v. R. R. Co.*, 17 Wall. (U. S.) 96; *Bates v. Androscooggin, &c. R. R. Co.*, 49 Me. 491; *Taft v. Hartford, &c. R. R. Co.*, 8 R. I. 310. In *Richardson v. Vermont, &c. R. R. Co.*, 44 Vt. 613, it was held that a railroad corporation has authority to stipulate that each stockholder shall be entitled to interest on sums paid on stock subscriptions while its road is in process of construction, till it is completed and goes into operation, payable whenever the surplus earnings shall enable it properly to pay such interest. Such an arrangement for the payment of "interest dividends" is equitable and just; and such payment, made only out of the surplus earnings not needed for the payment of the debts of the corporation or for the prosecution of its business, does not interfere with the rights of creditors, nor contravene any principle of public policy. And where the vote to pay such interest was passed at an annual meeting of the stockholders, the subject not being specially named in the notice calling the meeting, it was held without deciding whether the corporation had the right to pass such vote, that the defect, if any, could be cured by subsequent ratification; and that the subsequent action of the corporation in paying the interest to stockholders in pursuance of such vote, and the corporation and directors subsequently voting to issue certificates for the payment of such interest,

and the action of the treasurer in issuing such certificates, constituted a ratification of the vote. See also *Wright v. Vermont & Mass. R. R. Co.*, 12 Cush. (Mass.) 68; *Rutland R. R. Co. v. Thrall*, 35 Vt. 536; *Barnard v. Vermont & Mass. R. R. Co.*, 7 Allen (Mass.), 572.

<sup>2</sup> *Bailey v. Hannibal & St. Joseph R. R. Co.*, 1 Dill. (U. S. C. C.) 174; affirmed, 17 Wall. (U. S.) 96; *Calkins v. Camden, &c. R. R. Co.*, 36 N. J. Eq. 233.

<sup>3</sup> *Chesapeake, &c. R. R. Co. v. Paine*, 12 Gratt. (Va.) 502; *Baltimore, &c. R. R. Co. v. Gallahue*, 12 id. 655. But stock is not liable to attachment unless made so by statute. *Foster v. Potter*, 37 Mo. 525; *Howe v. Starkweather*, 17 Mass. 240. In Pennsylvania, stock standing in the name of a debtor on the books of the company may be seized and sold, either on *fieri facias*, or by attachment and execution process. But if it is subject to a lien in favor of the corporation, the proceeding by attachment is to be resorted to. *Weaver v. Huntingdon, &c. R. R. Co.*, 50 Penn. St. 314. The statute provides the mode for such attachments, and must be strictly pursued. *Howe v. Starkweather, ante*.

<sup>4</sup> *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; *Geyser v. Western Ins. Co.*, 3 Pittsb. (Penn.) 41.

<sup>5</sup> *Corneau v. Guild Farm Oil Co.*, 3 Daly (N. Y. C. P.), 218.

cannot sustain its refusal to transfer stock, after its assignment to a third person and its delivery, because before the demand for a transfer was made it was attached at the suit of a creditor of the assignor. But in Tennessee<sup>1</sup> it is held that such a state of facts operates as a valid excuse; and if the shares have been sold at sheriff's sale, and the shares have been transferred to the purchaser by the corporation, it is a complete answer to a suit by an assignor to compel a transfer to him, or for damages for refusing to transfer.<sup>2</sup>

**SEC. 92. Increase of Stock.**—A corporation has no power to increase or diminish its capital stock without an express statutory provision; but where this authority is given it may be exercised without any formal vote of the stockholders. If they acquiesce in such action it is sufficient.<sup>3</sup> But, unless the statute lodges the power to increase the stock in the directors, authority from the stockholders must be shown either by a direct vote or acquiescence.<sup>4</sup>

**SEC. 93. Fraudulent, and Over-issues of, Stock.**—Purchasers of stock are not bound to look beyond the certificate or to examine the books of the corporation to ascertain whether the transfer is valid or not; and even though the certificates are spurious and fraudulent, if they were issued by a duly authorized agent or officer of the company, and their issue was not *ultra vires* on the part of the corporation they are valid in the hands of innocent purchasers, and the company is liable to them therefor.<sup>5</sup> The same rules apply

<sup>1</sup> State Ins. Co. v. Sax, 2 Tenn. Ch. 507.

<sup>2</sup> Williams v. Mechanics' Bank, 5 Blatch. (U. S. C. C.) 59.

<sup>3</sup> Payson v. Stowers, 2 Dill. (U. S. C. C.) 427.

<sup>4</sup> Eidman v. Bowman, 58 Ill. 444.

<sup>5</sup> New York & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30; Titus v. Great Western Turnpike Co., 5 Lans. (N. Y.) 259; Tome v. Parkersburgh Branch R. R. Co., 39 Md. 81. This principle was acted upon in Western Maryland R. R. Co. v. Franklin Bank, 60 Md. In that case a railroad company employed an agent in Baltimore to take charge of the business of funding over-due coupons, and certificates were placed in his hands signed by the president and treasurer of the company to be filled out by him, when the coupons were taken up, with the number and description of the coupons. These receipts were fraudulently filled up and

disposed of by the agent to purchasers without notice and for value. The purchasers were without suspicion, but they all knew that the agent was in the employ of the railroad company, and they all knew the nature and scope of his employment. Such like certificates were at the time, being regularly bought and sold in the money and stock market of Baltimore, and were treated by those dealing in them, as passing title by delivery. It was held that the company having confided to him the special trust of executing that business, the agent was held out to the public as competent, faithful and worthy of confidence; and though he deceived both his principal and the public, by forging and issuing the false certificates, it was but reasonable that the principal who placed him in the position to perpetrate the wrong should bear the loss. That the facts that the certificates happened to be in the hands of a party who was an agent of the



as to over-issues of stock. If the capital stock is limited by the charter, and no power to increase it is given, all stock issued beyond the amount provided for in the charter would be void; but while *bonâ fide* purchasers of such stock would not be stockholders, nevertheless they would have a remedy against the corporation for the damages which they sustain by reason of the fraudulent or negligent acts of its agents;<sup>1</sup> and the measure of his damages is the market

company, or that they happened to represent on their face that the coupons had been deposited by such person, were not sufficient of themselves to discredit the certificates, or to require of innocent third parties to act upon the presumption that they were false and fraudulent. Corporations carrying on trade or business of any kind are equally, and to the same extent, liable for the frauds and wrongs of their agents, perpetrated in the course of their employment, as individual principals would be under like circumstances.

<sup>1</sup> New York & N. H. R. R. Co. v. Schuyler, 17 N. Y. 592; 34 id. 30; Mechanics' Bank v. N. Y. & N. H. R. R. Co., 13 N. Y. 599; Hall v. Rose Hill, &c. Road Co., 70 Ill. 673; People's Bank v. Kurtz, 99 Penn. St. 344; Henning v. N. Y. & N. H. R. R. Co., 9 Bos. (N. Y.) 283. In Bridgeport Bank v. N. Y. & N. H. R. R. Co., 30 Conn. 231, the plaintiffs in May, 1849, received from R. & G. L. Schuyler, as collateral security for money loaned, certificates for ninety shares of the stock of the defendant company, of which R. Schuyler was transfer agent. The certificate had shortly before been issued by Schuyler, as transfer agent, to the firm. At this time the capital stock of the company was fixed by its charter at \$2,500,000, which had all been taken and paid in. In July, 1854, it was discovered that Schuyler had fraudulently issued to the firm certificates of stock to a very large amount beyond the capital limited by the charter, of which 480 shares had been issued prior to the issuing of the certificates held by the plaintiffs, but there was no evidence that any of this spurious stock had at that time passed out of the hands of the firm. The firm owned at the time of the delivery of the certificates to the plaintiffs 160 shares of genuine stock. The certificates were accompanied, on the same paper, by a

printed form of assignment and power of attorney, which were executed by Schuyler in the name of the firm under seal, but were left in blank as to the names of the transferee and attorney. These instruments were in the form prescribed by the directors and which had from the first been in use. A by-law of the company provided that all transfers of stock should be made on the books of the company at the office of the transfer agent, and that no transfers should be allowed except upon a surrender of the certificate held by the party making the transfer, and this appeared upon the face of the certificate. Of the 480 shares over-issued at the time the plaintiffs took their certificates, the certificates of over 350 were within the next two years surrendered by the firm, and the stock which they purported to represent transferred on the books of the company to other parties. The plaintiffs held their certificates without calling for a transfer of the stock, and without giving notice to the company, until after the discovery of the fraud of Schuyler in July, 1854, when they made demand on the company to be allowed to transfer the stock to themselves under the power of attorney. The company refusing, they brought an action on the case for damages. It was held, 1. That the 90 shares would be presumed to be a part of the 160 genuine shares owned at the time by the firm, in the absence of proof on the part of the defendants to the contrary. 2. That, regarding the stock as genuine, the plaintiffs had not lost their right to it, and their right to a transfer of it on the books of the company, by the transfers to a greater amount than the 160 genuine shares made by the Schuylers to other parties on the books of the company, — the defendants having by their own by-laws, and by the conditions of their certificates,

value of his stock at the time the transfer was demanded.<sup>1</sup> It is a matter of no importance, so far as the liability of the company is concerned, whether the over-issued stock was to the transfer agent himself or to other parties.<sup>2</sup> The corporation may bring a bill in equity, as the proper guardian of the interests of the holders of the genuine stock against the holders of the disputed stock, to ascertain its validity, and to secure the cancellation of the spurious stock.<sup>3</sup>

*Where there is no authority for an increase of the capital stock of a corporation, or where the increase is limited to a certain amount, and the whole amount of it has been issued, all stock issued in excess of that*

no right to allow the stock to be transferred except upon a surrender of the certificates. 3. That the allowing of the transfer of the stock to other parties on the books of the company was a fraud of the transfer agent of which the defendants could not take advantage, since the agent was acting within the scope of his official power, and with full knowledge that the stock was owned by the plaintiffs, and that their certificate was outstanding, which knowledge possessed by the transfer agent while he was acting officially was the knowledge of the company. 4. That the blank assignment and power of attorney, though under seal, could be filled up at the convenience of the plaintiffs, and when so filled up operated as of their date. 5. That it was sufficient for this purpose that such was the law of New York, even though the assignment and power of attorney were executed in Connecticut, since the transfer of the stock was to be made in New York. Such a certificate, accompanied by an assignment and power of attorney executed in blank, may perhaps be regarded as having a species of negotiability, though of a peculiar character; and it is no objection to such negotiability that the assignment and power of attorney are under seal. The plaintiffs made a demand on the company to be allowed to transfer the stocks to themselves, on the day following the discovery of the fraud of Schuyler. At this time the affairs of the company owing to this fraud were in great confusion, and it was impossible without a long investigation to distinguish the spurious stock from the genuine. The transfer books were closed, and no transfer agent had been

appointed in the place of Schuyler who had absconded. One of the directors, to whom the plaintiffs applied at the office of the company, in reply to the demand, informed them that the transfer books had been closed, and that no transfers could be allowed. There was no refusal to allow the transfer at some future time. It was held, that in the circumstances the company were justified in refusing to allow the transfer, and that the demand was not a sufficient one to put the company in default. 6. The plaintiffs made another demand five years afterwards through one B., an attorney-at-law of the city of New York, who had made an agreement with the plaintiffs to bring and conduct the present suit for them at his own expense and risk, for a certain share of the amount actually recovered, and the demand was made under the agreement for the purpose of bringing the suit. During the trial, the fact of this agreement having been brought by the defendants to the notice of the court, the parties rescinded it. It was held, that the unlawfulness of the agreement did not make the demand an insufficient one, the question being purely one of authority on the part of B. to act for the plaintiffs.

<sup>1</sup> People's Bank v. Kurtz, *ante*; Willis v. Philadelphia, &c. R. R. Co., 6 W. N. C. (Penn.) 461.

<sup>2</sup> Titus v. Great Western Turnpike Road Co., 61 N. Y. 237; affirmed, 5 Lans. (N. Y.) 250.

<sup>3</sup> New York & N. H. R. R. Co. v. Schuyler, 17 N. Y. 592; Venice v. Woodruff, 62 N. Y. 462; Lehigh Valley R. R. Co. v. McFarland, 31 N. J. Eq. 730.

*amount is unauthorized and void*, whether the issue is made by the direction of the corporation or by the officers without such authority;<sup>1</sup> and a holder of such unauthorized stock is not entitled to any of the rights, or subject to any of the liabilities, of a stockholder;<sup>2</sup> and in the case last cited, it was held that the holders of such stock are not estopped from setting up its invalidity as a defence to an action to recover calls thereon, even though they attended the meeting at which it was voted to issue it, or by the fact that they accepted and hold the certificates issued therefor, or because the officers and agents of the company had represented in circulars that the authorized capital was equal to the entire issue of stock. In such a case, when the maximum limit of its capital stock had been reached, the power of the corporation in that respect was exhausted;<sup>3</sup>

<sup>1</sup> *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599; *Railway Co. v. Allerton*, 18 Wall. (U. S.) 233; *Stace's Case*, L. R. 4 Ch. 688, *n.*; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Scovill v. Thayer*, 105 U. S. 143; *N. Y. & N. H. R. R. Co. v. Ketcham*, 3 Keyes (N. Y.), 363.

<sup>2</sup> *Scovill v. Thayer*, *ante*.

<sup>3</sup> *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, *ante*; *N. Y. & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592. In *Scovill v. Thayer*, *ante*, Woods, J., in a very able opinion, reviewed the cases and the principles involved, and said: "In this case the attempt to increase the stock of the company beyond the limit fixed by its charter was *ultra vires*. The stock itself was therefore void. It conferred on the holders no rights, and subjected them to no liabilities. If the stock of the first and second issues had been held by one set of holders, and the stock of the third and fourth by another, in a contest between them the latter would have been excluded from all participation in the management of the company or in its profits. To decide that the holders of stock issued *ultra vires* have the same rights as the holders of authorized stock, is to ignore and override the limitations and prohibitions of the charter. We think it follows that if the holder of such spurious stock has none of the rights, he cannot be subjected to the liabilities of a holder of genuine stock. His contract to pay for

spurious shares is without consideration, and cannot be enforced. It is insisted, however, that the defendant in error, having attended by proxy the meetings at which the increase of the stock of the company beyond the limit imposed by law was voted for, and having received certificates for the stock thus voted for, and after such increase the company by its agents having held itself out as possessing a capital of \$400,000, and invited and obtained credit on the faith of such representations, he is now estopped from denying the validity of the stock and his obligation to pay for it in full. We think the defendant in error is not estopped to set up the nullity of the unauthorized stock. It is true that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create. *Upton v. Tribilcock*, 91 U. S. 45; *Chubb v. Upton*, 95 id. 655; *Pullman v. Upton*, 96 id. 328. But those were cases where the increase of the stock was authorized by law. The increase itself was legal and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of the defendant. But here, the corporation being absolutely without power to increase its stock above a certain limit, no acquiescence of the shareholder can give it validity or bind him or the corporation. 'A distinction

and the corporation itself cannot be estopped from setting up its want of corporate power in defence to an action upon a contract or other

must be made between shares which the company had no power to issue and shares which the company had power to issue, although not in the manner in which or upon the terms upon which they have been issued. The holders of shares which the company has no power to issue, in truth had nothing at all, and are not contributors.' 2 Lindley on Partnership, 138; and see *Lathrop v. Kneeland*, 46 Barb. 432; *Mackley's Case*, L. R. 1 Ch. 247. In *Stace and Worth's Case*, L. R. 4 Ch. 682, note, it appeared that there was an agreement for the amalgamation of the London Northern Insurance Corporation and the Life Investment Mortgage Insurance Company, the two corporations to be formed into one, under the name of the corporation first mentioned. The corporation was to issue shares in exchange for those held in the company, and the amalgamated board was to consist of the five directors of the corporation and of seven of the directors of the company, to be selected by themselves. After the amalgamation *Stace and Worth*, it was alleged, received and accepted certificates for shares in the corporation in exchange for their shares in the company, and they with five others were appointed directors of the corporation. Afterward a resolution was passed for voluntarily winding up the corporation, and the names of *Stace and Worth* were placed upon the list of contributors. An application was made to Vice-Chancellor JAMES to have their names removed from the list; who, after hearing the case argued, directed their names to be removed. This was done on the ground that the agreement for amalgamation was beyond the powers of the corporation, and therefore void. In giving the reasons for his decision Vice-Chancellor JAMES said: 'It is, however, contended that notwithstanding the agreement itself was *ultra vires* and void, yet there are personal acts and things personally affecting these two gentlemen which render them still liable as shareholders.' These were the acceptance of shares by *Stace and Worth*, the fact that their names appeared on the register of share-

holders, and that they had sat as directors of the corporation after the attempted amalgamation. But the Vice-Chancellor declared: 'This was a void agreement, with a void acting upon it, a void recognition, and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings, and that aggregate of nothings is all that there is to fix those gentlemen on the list of stockholders.' So in *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. (U. S.) 381, this court, after holding the railroad company to be liable on certain bonds which it was alleged had been indorsed by the directors without lawful authority, added, 'This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of its organization.' Upon the principles stated in these authorities we are of opinion that the defendant in error is not estopped by any acts of his, to assert the invalidity of the stock issued in excess of the limit authorized by the charter, and to deny his liability thereon. It would seem to follow that if he is not estopped by his own acts, he is not by the acts of the agents of the *Fort Scott Coal and Mining Company*, in representing the company, by advertisements and otherwise, as having a capital of \$400,000. The officers of the company had no authority to make these representations, and the public no right to trust them. Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. *Zabriskie v. The Cleveland, &c. R. R. Co.*, *ubi supra*. The laws secured to the public and the creditors an infallible mode of ascertaining the real capital of the company. They were bound to know that the law permitted no such increase of its capital stock as the company had attempted to make, and that any representation that it had been made was false. As forcibly suggested by counsel for defendant in error, if any creditor has been defrauded by misrepresentation of the

obligation which is in excess thereof;<sup>1</sup> there being a wide distinction between an act done by its officers or agents in an informal way, or without authority from the corporation, and which the corporation may ratify, and one which the corporation cannot ratify, because it has not the power to do the act itself.<sup>2</sup> Where the corporation has the power to do an act, — as, where it has the power to issue additional stock, — if the officers whose duty it is to issue certificates of stock, issue certificates thereof in excess of what have been authorized by the corporation, but not in excess of the power of the corporation to issue under its charter, they would be binding upon the corporation in the hands of a *bond fide* holder.<sup>3</sup> If a railroad com-

real capital of the company, he has his remedy in an action of tort *against all who participated in the fraud*. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders who have taken no part in it. We are of opinion, therefore, that the defendant in error is not estopped either by his own acts or the acts of the agents and officers of the company to allege the nullity of the over-issued stock, and that he is not liable to an assessment on such void stock."

<sup>1</sup> Hood v. N. Y. & N. H. R. R. Co., 22 Conn. 502.

<sup>2</sup> That informalities in the issue of stock cannot be set up either by the corporation or by a stockholder to avoid calls thereon, see Upton v. Trebilcock, 91 U. S. 45; Chubb v. Upton, 95 U. S. 655; Pullman v. Upton, 96 id. 328.

<sup>3</sup> In Mechanics' Bank v. N. Y. & N. H. R. R. Co., 13 N. Y. 599, by the act creating a corporation, its capital stock was limited to \$3,000,000, and divided into shares of \$100 each, transferable in such manner as the company should direct; the entire stock was taken, and certificates issued therefor to the owners; and the by-laws of the company prescribed that transfers of stock should be made on the transfer-books of the company, and required the certificate of ownership to be surrendered prior to the making of such transfer and the issue of a new certificate. The company established a transfer agency, and appointed their president transfer agent, who was authorized and accus-

tomed, on the transfer of stock on the books in his charge, and the surrender of the certificate therefor, to execute and deliver to the transferee the usual certificate, stating that he was entitled to the number of shares of stock specified therein, transferable on the books of the company by him or his attorney on the surrender of the certificate; the agent fraudulently gave to one Kyle a certificate in the usual form for eighty-five shares of stock, when, in fact, the latter owned no stock, none stood on the books in his name, and no certificate for such stock had been surrendered; the plaintiffs, in good faith, and relying upon the certificate as regularly issued and valid, made a loan to Kyle, receiving from him the certificate, with an assignment of the stock and a power of attorney to transfer the same. In an action by the plaintiffs against the corporation for refusing to permit the stock represented by the certificate to be transferred on its books, or to pay its value, it was held that the certificate was void, and that the plaintiffs did not thereby acquire a right, legal or equitable, to any stock; and that the corporation was not responsible to the plaintiffs for damage sustained by dealing upon the faith of the certificate. Such a certificate does not partake of the character of negotiable instruments; and the *bond fide* assignee, with the power to transfer the stock, takes the certificate, subject to the equities which existed against his assignor, and it was held that, on the facts of the case, the doctrine of *estoppel in pais* was not applicable. At a special term of the Supreme Court in New

pany is incorporated in two States, an over-issue of its stock by the corporation, if it can be legalized at all, cannot be legalized by the

York, it was held that a bill to enjoin the holders of railway bonds and other securities, which had been deposited with an agent of a railway company, with power to sell or pledge the same, for the purpose of raising money for the use of the company, and which it was alleged had been misapplied by such agent, and were now in the hands of numerous parties, upon different and independent contracts, which were severally alleged to be invalid as against the company, — could not be maintained against the agent and the several persons into whose hands he had passed the securities, there being no privity among the several defendants. But upon general principles of equity, it would seem that such a joinder amounts to multifariousness only when the securities in the hands of the different defendants are wholly distinct; in which case only the agent, and the particular person or persons obtaining each separate parcel of the securities constituting one transfer, should be joined. But if the fund were one and inseparable, all participating in its transfer may be joined. *Lexington & Big Sandy Railway v. Goodman*, 9 Am. Railw. Times, No. 52. In a case before V. C. STUART, it was decided, upon great consideration, that where the directors of a joint-stock corporation issue debentures (which are, in form, the bonds of the company, but not negotiable) without complying with the requirements of the deed of settlement, in regard to borrowing money, and such securities came into the possession of *bond fide* holders, for value, without notice of any infirmity affecting them, — such holder could not recover for them, as regards the great body of the shareholders. The learned Vice-Chancellor professed to base his judgment upon the authority of *Ernest v. Nicholls*, 6 H. L. Cas. 401. But see *Barnard v. Bagshaw*, 1 H. & M. 69, where it was held that *bond fide* purchasers of shares of a company fraudulently issued, bought in the market before any bill had been filed to impeach them, was entitled upon the winding up of the company to share equally with the shareholders, although he bought his shares at very

much less than par. See *N. Y. & N. H. R. R. Co. v. Schuyler*, 84 N. Y. 30; *Bruff v. Mali*, 36 id. 200; *Tome v. Parkersburgh, &c. R. R. Co.*, 39 Md. 36. In *Titus v. Great Western Turnpike Co.*, 5 Lans. (N. Y.) 236, the corporation was held liable for the stock so issued. In the case last cited an action was brought to recover damages for negligent and fraudulent acts of the defendants' president and treasurer, in issuing spurious certificates of the stock of the company, on the faith and security of which the plaintiff loaned money to the party holding them. The referee found that, on or about December 19, 1870, one McClure, the treasurer of the defendants, presented to the plaintiff two certificates of the defendants' stock, signed by Jacob H. Ten Eyck as president, and by said McClure as treasurer, and having the seal of the company attached, each of which certificates certified that McClure was the owner of five hundred shares in the stock of the defendants; and upon the credit of those certificates, which were offered as collateral security to the note of said McClure, dated on that day, and payable two days after date, with interest, he obtained from the plaintiff the sum of \$1,855, the plaintiff, at the time of receiving said certificates, knowing that the said McClure mentioned in the body of said certificates was the same person who had signed the same as treasurer: that said certificates were drawn up in the form prescribed by the by-laws of the defendants, and were signed by the two officers of the company, both of whom were directed and required, by a general resolution of the defendants, to sign certificates of the defendants' stock in cases where stock was transferred on defendants' books: that there was no by-law of the defendants making any exceptions as to the form of the certificate, or as to the officers who were to sign it when issued to the treasurer or the president of the company: that the said McClure delivered to the plaintiff, indorsed upon the said two certificates of stock, as part of the security for the loan, an assignment and power of attorney in blank,

legislature of *one* of the States from which it derives its existence, as, in such a case, neither State has exclusive jurisdiction over the

signed by the said McClure : that when the plaintiff took said certificates from said McClure, he had not any knowledge or suspicion that they did not represent stock of the company, and thought they were genuine and good certificates of stock. It was conceded on both sides, upon the trial, that the certificates were spurious and unauthorized, and did not represent actual stock, and so the referee found ; and he also found that the plaintiff had sustained loss by means of the transaction in question to the amount of the money advanced on the certificates, with interest. The referee's conclusions of law were : 1. That the general power given to the treasurer of the defendants to sign certificates of stock did not authorize him to sign certificates in his own name or favor ; 2. That no recovery can be had in this action by the plaintiff against the defendants, as such defect appeared upon the face of the certificates, and he had notice of it at the time he took them. And hence he held the defendants were entitled to judgment, and dismissed the complaint. PARKER, J., said : " The legal propositions upon which the decision of the case by the referee rests, and which are urged by the counsel for the defendants in support of the judgment, are : 1. That McClure, the treasurer, had no right to sign certificates of stock held by himself ; and 2. That the plaintiff, when he took the certificates in question, signed by McClure, saw that they were not properly signed, and therefore had notice of their irregularity and invalidity, and consequently cannot look to the defendants to make them good. The principle upon which defendant's counsel contend that McClure had no right to sign certificates of his own stock is, that he was an agent of defendants, and that an agent cannot certify *in his own favor* ; and the cases of *Clafin v. Farmers' and Citizens' Bank*, 25 N. Y. 293, and *New York & New Haven R. R. Co. v. Schuyler*, 34 id. 30, are cited in support of it. In the first of these two cases the president of the bank, who had a general authority to certify checks upon the bank as good, drew his own checks upon the

bank, and certified them in his character of president. It was held, that the certification of the checks was virtually an acceptance of them by the bank. SELDEN, Ch. J., in his opinion, says : ' The only question in this case which seems to me to require serious consideration is, whether Mr. Houghton could bind the bank by accepting checks or drafts drawn by himself. It is a well-settled rule of the law of agency, to which I apprehend there is no exception, that no person can act as the agent of both parties, although he himself have no interest on either side ; nor can he act as agent in regard to a contract in which he has any interest, or to which he is a party, on the side opposite to his principal. In the present case, Mr. Houghton, as the drawer of the checks, was the party with whom the contract of acceptance was primarily made, and stood, therefore, precisely in those opposite relations which the rule referred to forbids.' In *New York & New Haven R. R. v. Schuyler*, *ante*, the rule above adverted to was not applied to the case of an officer of a corporation signing the certificate of his own stock ; for, although the general rule was stated that ' an officer or agent is not permitted, under a general power, to certify in his own favor,' citing *Clafin v. Farmers' & Citizens' Bank*, yet the court went on to show that the case was clear of the rule, because of the acquiescence of the company in the acts of the agent in so certifying ; and the company was held liable for the spurious stock so certified. Under a sufficient authority from the company, then, according to the doctrine of this case, an officer may certify his own stock. Had not McClure, as treasurer of the defendants' company, sufficient authority to sign certificates of his own stock, as shown by the facts in the case ? The case is not like that of *Clafin v. Farmers' and Citizens' Bank*. There the certifying of the checks was the making of a contract by the president, as such, with himself, as an individual, under a mere general permission to him to certify checks. The construction of such a permission was very properly held not to authorize him to

corporation. The action of the legislature of *both* States would be necessary.<sup>1</sup> Where stock is issued by direction of the corporation in excess of the statutory limit, the corporation is liable to refund the money received therefor; but a person who is also a holder of valid

make such a contract. Presumptively, the intention in giving the general authority did not include such a case, one out of the ordinary course of business and contrary to business and legal rules, and one entirely unnecessary to the orderly course and management of the business of the company. Plainly, in that case, the act in question was not authorized by the general authority. But, in regard to certificates of stock, they are a necessary part of the machinery by which the business of corporations is carried on. They are issued to every stockholder as the evidence of his stock; to the officers as well as to the other stockholders. The defendants in the case at bar, by their by-laws, prescribed the form in which certificates of stock should be issued, and by a general resolution directed and required that all such certificates should be signed by the president and treasurer of the company, making no exception in regard to the certificates of stock held by such president or treasurer. Now, it is common, if not necessary, that these officers are stockholders of the corporation; and this fact cannot but have been known to defendants when the by-laws and resolution were adopted; and as no exception was made in regard to the issuing and signing of certificates to those officers, I think such certificates must be deemed covered by the resolution. There are no grounds, as in the case of *Claffin v. Farmers' and Citizens' Bank*, for presuming an intention to the contrary. In the case at bar the resolution does not, as in that case, authorize the making of *contracts* for the company, but it directs the performance of a mere ministerial act necessary to the orderly conduct of its business, in regard as well to the officers' stock as to that of other stockholders. In the signing of the certificates of his own stock, there is no such antagonism between him and the company, as in the case of the contract, and it is not to be presumed that the company intended when it imposed upon

these officers the duty of signing the certificates of stock issued by the company, that in every case of transfer or purchase of stock by them a new authority should be given by a new resolution of the company for the performance of the necessary ministerial acts, to perfect such transfer or purchases. The officer who signs certificates of his own stock no more really assumes a relation of opposition to the company than does the officer who enters the statement of his own stock in the books of the company; and the authority of such officer or clerk who keeps the books under a general authority to make an entry therein of the stock held by him might as well be questioned as that of McClure to sign a certificate of his stock. In either case the fair and reasonable construction of the general authority would allow such officers to enter or certify their own stock as they do that of others. I have no doubt that under the by-laws and resolution of the defendants the treasurer (McClure) was authorized to sign certificates of his own stock. If I am correct in this construction of the authority given, it follows that the decision of the referee in his first conclusion of law was erroneous, and that his second conclusion, based upon the first, was also erroneous. No question was made but that the defendants would be liable for the fraud or negligence of their president and treasurer in issuing the certificates of spurious stock, if they had the right to sign certificates of their own stock. The liability of the principal for such acts of its agent was distinctly affirmed in the *N. Y. & N. H. R. R. Co. v. Schuyler*, and in *Bruff v. Mali*, 36 N. Y. 200. In this case the cause of action was made out, and the plaintiff should have had judgment in his favor." Affirmed by the Court of Appeal, 61 N. Y. 237.

<sup>1</sup> *Fisk v. Rock Island, &c. R. R. Co.*, 53 Barb. (N. Y.) 513; *O'Brien v. Rock Island R. R. Co.*, 53 id. 568.



stock is not entitled to have the money paid upon the invalid stock offset against assessments upon his valid stock;<sup>1</sup> and where the fraudulent issue is made by an officer of the corporation, although he is the proper person to issue stock, the corporation is not responsible to the holders for the amount paid therefor, unless the directors have been guilty of such negligence in the matter as operates as a fraud upon purchasers of stock, and entitles them to equitable relief; in which case, such fraudulent stock being a cloud upon the title of the holders of the genuine stock, a court of equity, upon a proper bill

<sup>1</sup> In *Scovill v. Thayer*, *ante*, where the holders of stock issued in excess of the statutory limit, were also holders of valid stock, and the company had been thrown into bankruptcy, in an action by the assignee to recover the unpaid assessments upon the stock, it was held that the amount paid by such stockholder for the invalid stock could not be set off against the assessments upon his valid stock. "It is a general rule," says WOOD, J., "that a holder of claims against an insolvent corporation cannot set them off against his liability to assessment on his stock in the corporation, in a suit by an assignee in bankruptcy. *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Sawyer*, 91 U. S. 56; *Scammon v. Kimball*, 92 id. 362; *County of Morgan v. Allen*, 103 id. 498. The ground upon which this rule stands is thus stated by Mr. Justice MILLER in *Sawyer v. Hoag*, *ante*: 'The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging in equity to all its creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.' The defendant in error seeks to avoid the application of this rule in his case on the ground that the real capital of the company was only \$200,000, and this constituted the trust fund for the security of the debts of the company; that all the money that had been paid in as capital stock had been paid into that fund, and that the party paying any money to that fund was enti-

tled to credit upon his dues thereto. We cannot assent to this view. The defendant in error was as much bound to know the limits of the charter of the company in which he was a stockholder, as the public or the creditors of the company. When he paid in his money on the void stock, he knew that he was not paying it on the valid stock, and he is presumed to have known that it was not a good payment on the valid stock. The company had no right to apply it on the valid stock without his direction. He never directed such application, and it remained in the possession of the company until the rights of the assignees in bankruptcy attached. To say that it was a contribution to the trust fund devoted to the payment of the creditors of the company is an entire misapprehension. It could not be such a contribution unless it was a payment on the stock of the company; and this, we have seen, was not the case. No call had been made by the company upon the valid stock to which the payments on the void stock could be said to apply. No call could have been made by the company under its agreement with the stockholders, unless to pay its creditors; and it does not appear that when the payments were made the company had any creditors. It was a voluntary payment for the benefit of the company, and tended to increase the value of the authorized stock. In that way the stockholders got the benefit of it. There is no rule of law or equity which entitles him in a contest between himself and the creditors of the company, either to receive a credit for it on his unpaid stock, or to have it repaid to him *pro rata* out of the assets of the company."

brought by the corporation, will remove it,<sup>1</sup> the corporation acting as the representative of the stockholders. In some early cases in the Supreme and Superior Courts of New York,<sup>2</sup> it was held that a railroad company whose officers had issued stock in excess of the amount authorized by its charter, were bound thereby in any event, — applying the ordinary rule applicable in the case of an ordinary agent, that where a corporation has held a person out as possessed of authority to do a certain act, it is bound by his acts. But the court lost sight of the fact that this rule could only apply to cases *where the principal himself could not lawfully perform the act, and could have no force whatever where no negligence on the part of the corporation is shown, and the act would have been ultra vires if done by the corporation itself*; and the Court of Appeals, as we have seen,<sup>3</sup> reversed this ruling, and held that, under such circumstances, the corporation could not be held chargeable; and as the question was then presented to the court, this doctrine seems to us to be sound and unassailable. *But where the directors of the corporation have been guilty of negligence in the matter, and the officer who issues the spurious and unauthorized stock have general authority to issue certificates to subscribers and purchasers in the same form, the corporation may be made liable to innocent purchasers for the negligence of the directors; and the measure of damages would be the sum paid for the stock, with interest to the date of recovery.*<sup>4</sup>

**SEC. 94. Corporation may Contract for Sale of Stock, before Authority to build road is Obtained.** — Where a railroad corporation already organized contemplates an extension of its road beyond the point originally intended, it may lawfully enter into a contract for the sale of stock for such additional increase in its line before it has even applied to the legislature for the requisite authority to extend its road, the contract being conditional upon the building of such extension.<sup>5</sup>

<sup>1</sup> New York & N. H. R. R. Co. v. Schuyler, 17 N. Y. 592; New York & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30.

<sup>2</sup> Mechanics' Bank v. N. Y. & N. H. R. R. Co., 4 Duer (N. Y.), 480; N. Y. & N. H. R. R. Co. v. Schuyler, 38 Barb. (N. Y.) 534.

<sup>3</sup> Mechanics' Bank v. N. Y. & N. H. R. R. Co., 13 N. Y. 599.

<sup>4</sup> N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30.

<sup>5</sup> Supervisors of Portage Co. v. Wisconsin, &c. R. R. Co., 121 Mass. 460.

## CHAPTER VI.

## TRANSFER OF SHARES.

SEC. 95. Nature of Property in Shares:  
How transferred.

96. Assignment of, Effect of.

SEC. 97. Liability of Company for refusing to enter Transfer.

98. Remedies for.

99. Pledge of Stock.

**SEC. 95. Nature of Property in Shares: How transferred.**—Whatever may formerly have been the rule, it is now well settled that shares in a corporation, although its property is mainly real estate, are personal property, whether there is a clause to that effect in the act creating it or not.<sup>1</sup> The certificates which represent the shares are not strictly negotiable instruments,<sup>2</sup> but are rather *quasi negotiable*,

<sup>1</sup> *Johns v. Johns*, 1 Ohio St. 350; *Ashton v. Langdale*, 20 L. J. Ch. 234; *Arnold v. Ruggles*, 1 R. I. 165; *Slaymaker v. Gettysburgh Bank*, 10 Penn. St. 373; *Howe v. Starkweather*, 17 Mass. 243; *Gilpin v. Howell*, 5 Penn. St. 57; *Bank of Waltham v. Waltham*, 10 Met. (Mass.) 334; *Union Bank of Tennessee v. State*, 9 Yerg. (Tenn.) 490; *Denton v. Livingston*, 9 Johns. (N. Y.) 100; *Heart v. State Bank*, 2 Dev. (N. C.) Ch. 111; *State v. Franklin Bank*, 10 Ohio St. 91; *Planters' Bank v. Merchants' Bank*, 4 Ala. 753; *Cape Sable Co.'s Case*, 3 Bland (Md.), 606; *Mohawk, &c. R. R. Co. v. Clute*, 4 Paige (N. Y.) Ch. 384; *Chesapeake, &c. R. R. Co. v. Paine*, 29 Gratt. (Va.) 502; *Bradley v. Holsworth*, 3 M. & W. 422; *Mayer v. Childs*, 47 Cal. 142; *Tempest v. Kilner*, 3 C. B. 249; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211; *Tisdale v. Harris*, 20 Pick. (Mass.) 9; *Weaver v. Barden*, 49 N. Y. 286; *Pinkerton v. Manchester, &c. R. R. Co.*, 42 N. H. 424; *Baltimore, &c. R. R. Co. v. Sewell*, 35 Md. 238; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; *Duncuot v. Albrecht*, 12 Sim. 189. But in Kentucky it has been held that they are real estate,

*Price v. Price*, 9 Dana (Ky.), 107; *Copeland v. Copeland*, 7 Bush (Ky.), 349; also to the same effect, see *Welles v. Cowles*, 2 Conn. 567. Even where the charter expressly provides that the stock, &c. shall be held as real estate and descend as such, it has been held that this only related to the interests of the stockholders themselves, and that as to third persons the character of the property was not changed. *Cape Sable Company's Case*, 3 Bland's Ch. (Md.) 606. See, however, *Cooper v. Dismal Swamp Co.*, 2 Murph. (N. C.) 195; *Robinson v. Addison*, 2 Beav. 515.

<sup>2</sup> *Cecil National Bank v. Watsontown*, 105 U. S. 17; *Emery's Sons v. Irving National Bank*, 25 Ohio St. 360; *Loeb v. Peters*, 63 Ala. 243; *Pollard v. Vinton*, 105 U. S. 5; *Tiedman v. Knox*, 53 Md. 612; *McNeil v. Tenth National Bank*, 46 N. Y. 325. They are not securities for money, nor are they negotiable securities in a commercial sense. They are rather muniments and evidence of the holder's title to a given share in the property and franchises of the corporation. *Mechanics' Bank v. N. Y. & H. R. Co.*, 13 N. Y. 627; *Sherwood v. Meadow Valley Mining*

and placed upon the same footing as warehouse receipts, cotton-press notes and bills of lading.<sup>1</sup> By an indorsement in blank with an ir-

Co., 50 Cal. 412. The case last cited was an action based on the following facts: One Schmeidell was the owner of twenty shares of the stock of the defendant, and held a certificate therefor issued to himself as trustee, and he sold the shares and delivered the certificate properly indorsed to Levy, who lost the same, not having had the stock transferred on the books of the corporation. The plaintiff purchased (as he supposed) the stock, and received delivery of the certificate for value, in the usual course of his business as a stock-broker. It was held that the plaintiff acquired no right to the stock. Where stock of an incorporation stands on the books in the name of A., and the stock is owned by B., and the certificate though properly indorsed is stolen from B. without his fault, the thief can pass no title to a purchaser in the ordinary course of business, for value, without notice of any defect in the vendor's title, and B. may pursue and recover his property. *Winter v. Belmont Mining Co.*, 53 Cal. 428, distinguished. *Barstow v. Savage Mining Co.*, Cal. S. C. Dec. 1844. See also *Brown v. Hartford Fire Ins. Co.*, 42 Md. 384, where the same rule was adopted where the assignment was forged. But, where the owner of stock indorses it in blank with an irrevocable power of attorney to transfer it, it is as nearly negotiable as the nature of the property will admit of, and the property therein passes from one to another by delivery. *Wood's Appeal*, 92 Penn. St. 379; *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; *Tome v. Parkersburgh R. R. Co.*, 39 Md. 36. While a purchaser does not hold the certificates as negotiable paper, he has a right, if he actually paid value upon the faith of the certificates and acquired an assignment of the apparent title, to be protected, upon the doctrine of estoppel, against claims of third persons of which he had no notice. If the rightful owner has invested a third person with apparent authority to sell the shares represented by the certificate, he cannot repudiate such authority to the prejudice of one who has bought and paid on the faith of such appearance

of authority. *Weaver v. Barden*, 49 N. Y. 286. *Stinson v. Thornton*, 56 Ga. 377. And the corporation is estopped to deny the statements in the certificate to the prejudice of such a purchaser for value and without notice. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Driscoll v. West, & Co. Mfg. Co.*, 36 N. Y. S. C. 488; *Lee v. Citizens' Nat. Bank*, 2 Cin. (Ohio) 298, are not negotiable paper, and can only be assigned by an act of the company, or in pursuance of a by-law. *Hall v. Rose Hill, & Co. R. R. Co.*, 70 Ill. 673; *Weaver v. Barden*, 49 N. Y. 286.

<sup>1</sup> *Lanier v. Bank*, 11 Wall. (U. S.) 369. They are likened to bills of lading and other *quasi* negotiable securities. *Ross v. S. W. R. R. Co.*, 53 Ga. 514; *Black v. Zacharie*, 3 How. (U. S.) 483; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Prall v. Tilt*, 27 N. J. Eq. 393; *Finney's Appeal*, 59 Penn. St. 598; *Smith v. Crescent City Co.*, 30 La. An. 1378; *Conant v. Seneca Co. Bank*, 1 Ohio St. 298; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Campbell v. Morgan*, 4 Brad. (Ill.) 100; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599; *Shaw v. Spencer*, 100 Mass. 382; *Weaver v. Barden*, 49 N. Y. 286; *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 277; *Winter v. Belmont Mining Co.*, 53 Cal. 428; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; *Merchants' Bank v. Richards*, 9 Mo. App. 454; *Bridgeport Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn. 269; *Wood's Appeal*, 92 Penn. St. 379; *McAllister v. Kuhn*, 96 U. S. 89; *Johnston v. Laffin*, 108 id. 800; *Shaw v. R. R. Co.*, 101 id. 504; *First Nat. Bank v. Bryce*, 78 Ky. 42; *Glyn Mills Co. v. East & West India Docks Co.*, L. R. 7 App. 591; *Shropshire Union Railway Co. v. Queen*, L. R. 7 H. L. 496; *Guernsey v. Behrend*, 3 El. & Bl. 633; *France v. Clark*, L. R. 22 Ch. 830; *Grissell v. Bristowe*, L. R. 3 C. P. 112; *Holmes v. Bailey*, 92 Penn. St. 57; *Security Bank*

revocable power of attorney, the property therein passes from one person to another by delivery, and the last holder may fill up the blanks, and thereupon is entitled upon demand of the corporation, to have new certificates issued to him.<sup>1</sup> But the party claiming under a transfer by indorsement and delivery, must prove the contract and consideration,<sup>2</sup> although a presumption arises from the possession of the certificate of stock indorsed in blank, that the holder is the owner, even though the certificate and indorsement are in the name of another person; and an innocent purchaser for value takes the legal and equitable title to the shares represented by such certificate.<sup>3</sup>

In a leading case under this head,<sup>4</sup> it appeared that a certificate of stock for one hundred and fifty shares was issued to A. by the

*v. Lutyren*, 29 Minn. 363; *Stollenwerck v. Thatcher*, 115 Mass. 224; *National Bank v. Dearborn*, 115 id. 229; *Burton v. Patterson*, 12 Phila. (Penn.) 397; *First National Bank v. Northern R. R. Co.*, 58 N. H. 203; *Hubbell v. Drexel*, 11 Fed. Rep. 115; *Strange v. Houston R. R. Co.*, 53 Tex. 162; *State v. North La. R. R. Co.*, 34 La. An. 947.

<sup>1</sup> *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; *Bridgeport Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn. 231; *Dunn v. Commercial Bank of Buffalo*, 11 Barb. (N. Y.) 580. As against all persons but the corporation, the sale of shares is completed when the seller has subscribed the proper authority to the transfer agents of the company to make a transfer on the books, and has delivered this with the old certificate to the buyer, and the latter has paid the price. These acts transfer the title, subject only to any right the company may have to refuse assent to a transfer. A formal transfer on the books and issue of a new certificate are not necessary to perfect the buyer's title. *Ross v. Southwestern R. R. Co.*, 53 Ga. 514; *Bruce v. Smith*, 44 Ind. 1; *Bank of America v. McNeil*, 10 Bush (Ky.), 54; *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Leitch v. Wells*, 48 N. Y. 585; *Hill v. Newichawanick Co.*, 48 How. Pr. (N. Y.) 427. This principle may be applied as between seller and buyer of shares, notwithstanding the gene-

ral law declares that no transfer of stock shall be valid for any purpose whatever, until it shall have been entered in the book prescribed, and in accordance with the law. Such an enactment should be confined in its application to the objects sought, which are the security and ease of remedy of creditors and the information of stockholders and creditors. It does not affect, as between vendor and vendee, the validity of an assignment of stock; but a buyer who has received, under a contract of sale, a certificate with power of attorney to transfer the shares into his own name upon the books, is liable to the seller, notwithstanding he neglects to transfer them, for any debts thereafter incurred by the corporation, which the seller is obliged to pay by reason of his name remaining among the stockholders. *Johnson v. Underhill*, 52 N. Y. 203.

<sup>2</sup> *Dunn v. Commercial Bank*, *ante*.

<sup>3</sup> *Carroll v. Mullanphy Savings Bank*, 8 Mo. App. 249; *Cherry v. Frost*, 7 Lea (Tenn.), 1; *Otis v. Gardner*, 105 Ill. 536; *Matthews v. Bank Holmes*, (U. S. C. C.) 396; *Leavitt v. Fisher*, 4 Duer (N. Y.), 1; *Cornick v. Richards*, 3 Lea (Tenn.), 1; *Day v. Holmes*, 103; *German, &c. Assoc. v. Sendmeyer*, 50 Penn. St. 67; *Mount Holly Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Cutting v. Damrell*, 88 N. Y. 410; *Bridgeport Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn. 231.

<sup>4</sup> *Lanier v. First National Bank*, 11 Wall. (U. S.) 377.

defendant bank, which upon its face stated that it was transferable "only upon surrender of the certificate." At the same time that the stock was issued to A., he pledged it to the bank as collateral security for deposits made with a firm of which A. was a member, he retaining the certificate. He executed a power of attorney, authorizing the attorney to sell and transfer the stock in case the bank should deem it necessary, and to apply the proceeds to the liquidation of any balance due. A. afterwards sold the certificate for its full value. Before such sale, the bank had sold fifty shares of the stock, and before notice of the sale to the plaintiffs sold all the shares, under the power of sale, to innocent purchasers for value, and issued to them new certificates. Two years after the purchase by them, the plaintiffs demanded a transfer of the stock by the bank to their names, which the bank refused. In an action against the bank it was held that it was liable to the plaintiffs,—DAVIS, J., saying, "The power to transfer their stock, is one of the most valuable franchises conferred by Congress on banking associations. Without this power, it can readily be seen, the value of the stock would be greatly lessened, and obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder than of the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage. It is in obedience to this requirement that stock-certificates of all kinds have become the basis of commercial transactions in all the large cities of the country, and are sold in open market, the same as other securities. *Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable.* If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned with power to transfer, is entitled to

have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates."<sup>1</sup>

**SEC. 96. Assignment of, Effect of.**—By an assignment accompanied with an irrevocable power of attorney, a stockholder transfers all his interest in the stock to the assignee, although the transfer is not made conformably to the rules and by-laws of the corporation;<sup>2</sup> but the assignee takes the stock subject to all equities

<sup>1</sup> See also *Brisbane v. Delaware, Lackawanna, &c. R. R. Co.*, 25 Hun (N. Y.), 438, where a similar doctrine was held where stock was transferred by a corporation to an administrator, without a surrender of the certificate.

<sup>2</sup> *Gilbert v. Manchester Iron, &c. Co.*, 11 Wend. (N. Y.) 627; *Sargent v. Essex, &c. R. R. Co.*, 9 Pick. (Mass.) 204; *Quiner v. Marblehead, &c. Ins. Co.*, 10 Mass. 476. A person purchasing stock at an execution sale, which he knew had been assigned by the judgment creditor before levy, gets no better title than the debtor had at the time of sale. *Newberry v. Detroit, &c. Mfg. Co.*, 17 Mich. 141. Such an assignment vests in the assignee only an equitable title as against the company, but an absolute legal ownership as against the assignor, even though there has been no manual delivery of the certificate. *Grymes v. Hone*, 49 N. Y. 17. Both the legal and equitable title to the stock is, in most of the States, held to be vested in the assignee of the certificates, and he holds the absolute ownership of the stock represented by such certificates. *Colebrooke on Collateral Securities*, § 269; *Otis v. Gardner*, 105 Ill. 436; *Ex parte Aqua Bank*, L. R. 3 Ch. App. 555; *Ex parte Bank of Manchester*, L. R. 12 Eq. Cas. 354; *Ex parte Sargent*, L. R. 17 Eq. Cas. 273; *First National Bank v. Hartford Ins. Co.*, 45 Conn. 22; *Fraser v. Charleston*, 11 S. C. 486; *Baldwin v. Canfield*, 26 Minn. 43; *Cherry v. Frost*, 7 Lea (Tenn.), 1; *Cornick v. Richards*, 3 id. 1; *Carroll v. Mullanphy Banking Co.*, 8 Mo. App. 249, which is protected against attachment at the suit of creditors of the assignors. *National Bank v. Watsontown*, 105 U. S. 217; *Merchants' National Bank v. Richards*, 6 Mo. App. 454; *Finney's*

*Appeal*, 59 Penn. St. 398; *Hasbrouck v. Vandervoort*, 4 Sandf. (N. Y.) 74, although the stock is only held as collateral security for a loan. But a transfer of stock, until entered on the books of a corporation, has no validity as against the corporation, and until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done, or demanded to be done, the person in whose name the stock is entered on the books of the company is, as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of an election. *State v. Ferris*, 42 Conn. 560; *Hoppin v. Buffum*, 9 R. I. 513; *Gilbert v. Mfg. Iron Co.*, 11 Wend. (N. Y.) 627; *Bank of Utica v. Smalley*, 2 Com. 770; *Bank of Buffalo v. Kortright*, 22 Wend. (N. Y.) 348; *State v. Pettinelli*, 10 Nev. 141. "As between a corporator and the corporation, the records of the corporation or its stock-book, as it is called, is the evidence of their relation. Meetings of the stockholders, elections and dividends, etc., are regulated by this record. The certificate is but secondary evidence, and is never demanded except when the stockholder deals with the corporation in a contract relation. Bank of Commerce's *Appeal*, 73 Penn. St. 59. Whatever rights the purchaser of a certificate of stock may acquire as between himself and his vendor, it is well settled that between himself and the corporation, he acquires only an equitable title; and until he secures a transfer on the books of the company he is not a stockholder, and has no claim to act as such. N. Y. & N. H. R. Co. v. *Schuyler*, 34 N. Y. 80; *Grymes v. Hone*, 49 id. 17; *People v.*

in favor of the corporation,<sup>1</sup> or third persons who have not had notice of the transfer. Indeed, it seems to be quite well settled by the later cases that, as against *all persons but the corporation*, the sale of shares is complete when the seller has subscribed the proper authority to the transfer agents of the company to make a transfer on the books, and has delivered it with the old certificate to the buyer, and the price has been paid, or the terms of credit therefor, if any, have been arranged. These acts convey the title, subject only to the right of the company to refuse assent to a transfer, for any valid reason. A formal transfer upon the books of the company, or the issue, of a new certificate, only, are necessary to perfect the buyer's rights. His title thereto is perfect, without these formalities,<sup>2</sup> as against all the world, *except subsequent purchasers in good*

Robinson, Cal. S. C. Dec. 1883." *Cheever v. Meyer*, 52 Vt. The person liable as a stockholder is the one in whose name the stock stands on the books of the bank, although in fact it belonged to another person, who had transferred it to the person charged, by way of hypothecation. *Case of Empire City Bank*, 8 Abb. (N. Y.) Pr. 192; 18 N. Y. 199; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183. See also *Crease v. Babcock*, 10 Met. (Mass.) 525; *Grew v. Breed*, id. 569.

<sup>1</sup> *Stebbins v. Phenix Ins. Co.*, 3 Paige Ch. (N. Y.) 350; *New York, &c. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Mechanics' Bank v. New York, &c. R. R. Co.*, 13 id. 599. As has been previously stated, certificates of stock, assigned in blank, are not negotiable instruments, and no commercial usage can clothe them with such attributes. They are merely the evidence of the holder's right to the shares which they represent, and this right is not perfected until the blank assignment is finally filled out, and the holder procures a transfer to be made upon the company's books, and takes a new certificate in his own name; and this feature, of itself, prevents it from assuming the character of negotiability. *Shaw v. Spencer*, 100 Mass. 382.

<sup>2</sup> *Ross v. South Western R. R. Co.*, 53 Ga. 514; *Hill v. Newichawanick Co.*, 48 How. Pr. (N. Y.) 427; *Scripture v. Frankestown Soapstone Co.*, 50 N. H. 571; *Leitch v. Wells*, 48 N. Y. 585; *Bruce v. Smith*, 44 Ind. 1; *McNeil v. Tenth Na-*

*tional Bank*, 46 N. Y. 325; *Bank of America v. McNeil*, 10 Bush (Ky.), 54; *Bank of Commerce's Appeal*, 73 Penn. St. 59; *Stone v. Hackett*, 12 Gray (Mass.), 227; *De Corneau v. Guild Farm Oil Co.*, 3 Daly (N. Y. C. P.), 218; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *Weston v. Bear River, &c. Co.*, 6 id. 425; *Winter v. Belmont Mining Co.*, 53 id. 428; *People v. Elmore*, 40 id. 614; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211; *Bank of Utica v. Smalley*, 2 Caw. (N. Y.) 770; *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616; *Orr v. Bigelow*, 14 id. 556; *Isham v. Buckingham*, 49 id. 216; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Johnson v. Underhill*, 52 id. 203; *Merchants' National Bank v. Richards*, 6 Mo. App. 454; *Driscoll v. West, &c. Mfg. Co.*, 36 N. Y. Superior Ct. 488; *Boatman's Ins. Co. v. Able*, 48 Mo. 136; *Noyes v. Spaulding*, 27 Vt. 420; *Parrott v. Byers*, 40 Cal. 614; *Baltimore City Pass. R. R. Co. v. Sewell*, 35 Md. 238; *Duvig v. Pericardos*, 96 U. S. 193; *Kellogg v. Stockwell*, 75 Ill. 68; *Conant v. Seneca Co. Bank*, 1 Ohio St. 298; *Campbell v. Morgan*, 4 Bradw. (Ill.) 100; *Choteau Spring Co. v. Harris*, 20 Mo. 382; *Haldeman v. Hillsborough, &c. R. R. Co.*, 2 Handy (Ohio), 101. But see *Shenandoah Valley R. R. Co. v. Griffith*, 76 Va. 913, where it was held that an attaching creditor would hold stock attached, although prior thereto the stock had been assigned to a *bona fide* purchaser, but of which the attaching creditor had no notice. See also *Pinkerton v. Man-*



*faith without notice of the sale.*<sup>1</sup> This doctrine is held to apply even where the general law declares that no transfer of stock shall

chester, &c. R. R. Co., 42 N. H. 424. Stock standing in the name of an assignee as security for a debt, although the debt has been paid, cannot be attached as the property of the assignor. *Beckwith v. Burrough*, 13 R. I. 294. The assignment of the certificate, with the necessary power to the assignee to transfer the stock to himself on the company's books, is a symbolical delivery, affecting those who have notice thereof, as if the transaction had been made on the books. *Bank of America v. McNeil*, 10 Bush (Ky.), 54. In *Cutting v. Damerel*, 88 N. Y. 410, in an action by the receiver of an insolvent corporation to recover of the defendant the unpaid balance due upon ten shares of the capital stock of the corporation, of which the defendant was at one time owner, it appeared that the defendant purchased the stock in 1869. In 1874 he requested one O., the clerk of the corporation, to find a purchaser, and under the direction of B., the president of the corporation, O. purchased such stock for B. & Co., of which firm B. was a member, and B. paid the defendant therefor by a check on the corporation, which was charged to B. & Co. on its books. The defendant delivered the certificates of stock to O., with a transfer of the stock signed by him in blank, no name being inserted as transferee. B. was from that time until the receiver was appointed president of the corporation, and his partner was one of the trustees. For four years after the sale the dividends on the stock were paid to B. & Co., as appeared in the books of the corporation. The transaction relating to the sale of the stock was with B. alone. It was held that as between the defendant, the corporation, and B. & Co., the sale of stock was valid and complete, and that the receiver stood in no better position than the corporation to deny the validity of the sale, even though the defendant remained registered as a stockholder. "The rule is well settled that one who takes a certificate with the usual power of attorney, as between him and the transferee, takes the whole title, both legal and equitable, and it makes no difference that the blanks are

not filled up. The purchaser here, having taken the stock with a blank power of attorney signed by the defendant, within the authorities took a complete and perfect title to the stock, and was the absolute owner thereof. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616, 624. See also *Driscoll v. W. B. & C. M. Co.*, 59 id. 96. For the purpose of determining the stockholder's liability in case of the insolvency of a corporation, the stock-books of the corporation are not conclusive. While these books are in many cases evidence of the ownership, this rule is not without exception." The cases *Adderly v. Storms*, 6 Hill, (N. Y.) 624; *Mann v. Currie*, 2 Barb. 294; *Rosevelt v. Brown*, 11 N. Y. 148; *Webster v. Upton*, 91 U. S. 65; *Pullman v. Upton*, 96 id. 329, were distinguished in *Cutting v. Damerel*, *ante*.

<sup>1</sup> *People v. Elmore*, 35 Cal. 653; *Naglee v. Pacific Wharf Co.*, 20 id. 529. But his title is not good as against subsequent purchasers or pledgees of the stock, without notice of the assignment. Thus, in *Platt v. Birmingham Axle Co.*, 41 Conn. 255, a married woman owning stock in a manufacturing corporation, which stood in her name, joined with her husband in a written assignment of it to A., to secure a loan made by him to the husband. The certificate of stock, which contained a provision that the stock should be transferred only on the books of the corporation upon surrender of the certificate, was delivered to A., but no transfer was made on the books. A. gave no notice to the corporation, and it had no notice of the transaction except so far as it was chargeable with the knowledge of the husband, who was at that time its secretary. Two years after, the corporation made a loan to the wife, at the request of both husband and wife, and upon the agreement of both that the stock should be transferred to it on the books as security. This transfer was soon after made by the wife alone. The agent of the corporation at the time asked for the certificate, and was told by her that it was at her house, and that she would get it, and he did not inquire further. By stat-

be valid for any purpose whatever, until it shall have been entered in the book prescribed, and in accordance with the law. Such an

ute the corporation had a lien on the stock of its members for any debt due from them. Since the transaction the wife had died, and the husband had from the first been insolvent. Upon a bill in chancery brought by A. to compel the corporation to transfer the stock to him, it was held, first, that the knowledge of the husband, while secretary of the corporation, was not the knowledge of the corporation; second, that the corporation, although organized for manufacturing purposes, was not going beyond its powers in making, incidentally, such a loan; third, that independently of the transfer of the stock to the corporation, it had a statutory lien on the stock for the debt due from the wife, and that this lien took precedence of the lien of the petitioner; fourth, that the neglect to require the wife to produce and surrender the certificate at the time of the loan and transfer, was not sufficient to prevent the lien from attaching. Instances, however, are rare in which stock will be purchased unless the seller produces the certificate; and, as it is held that the possession of the certificate by a third person, accompanied by an assignment and power of attorney to transfer it on the books, is presumptive evidence of ownership by the holder, it is quite evident that a person who purchases the stock without requiring the vendor to produce the certificate, takes it at his peril; and if the person holding the certificate subsequently procures a transfer to be made to him upon the books of the corporation, neither the creditors of the assignor nor a purchaser from him can impeach such holder's title. *Johnston v. Lafflin*, 108 U. S. 800; *Prall v. Tilt*, 28 N. J. Eq. 480; *Webster v. Upton*, 91 U. S. 65; *Fatman v. Loback*, 1 Duer (N. Y.), 354; *Bank v. Lanier*, 11 Wall (U. S.) 369; *Wood's Appeal*, 92 Penn. St. 379; *Dovey's Appeal*, 97 id. 58; *Continental Bank v. Elliott Bank*, 7 Fed. Rep. 369; *Moodie v. National Bank*, 11 Phila. (Penn.) 366; *Bank v. Campbell*, 2 Rich. (S. C.) Eq. 179; *Fraser v. Charleston*, 11 S. C. 486; *Kortright v. Commercial Bank*, 20 Wend. (N. Y.) 91. In *Bridgeport*

*Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn. 275, this question was considered, and it was held by the courts that where the by-laws of a corporation provided that stock should not be transferred except upon a surrender of the certificate, a transfer permitted by it without such surrender, when the corporation, or any of its officers or agents who had charge of the transfer of its stock had knowledge that the certificate had been assigned to other parties, was fraudulent as to such parties, and entitled them to a transfer of the stock on demand, or, in case said corporation refused to transfer it, to recover of it the value of the stock. In that case the plaintiffs in May, 1849, received from R. & G. L. Schuyler, as collateral security for money advanced, certificates of 90 shares of the stock of the New York & New Haven R. R. Co., of which R. Schuyler was transfer agent. The certificates had shortly before been issued by Schuyler, as transfer agent, to the firm. At this time the capital stock of the company was fixed by its charter at \$2,500,000, which had all been taken and paid in. In July, 1854, it was discovered that Schuyler had fraudulently issued to the firm certificates of stock to a very large amount beyond the capital limited by the charter, of which 480 shares had been issued prior to the issuing of the certificates held by the plaintiffs, but there was no evidence that any of this spurious stock had at that time passed out of the hands of the firm. The firm owned at the time of the delivery of the certificates to the plaintiffs, 160 shares of genuine stock. The certificates were accompanied on the same paper by a printed form of assignment and power of attorney, which were executed by Schuyler in the name of the firm under seal, but were left in blank as to the names of the transferee and attorney. These instruments were in the form prescribed by the directors, and which had from the first been in use. A by-law of the company provided that all transfers of stock should be made on the books of the company at the office of the transfer agent, and that no transfers should be

enactment is confined in its application to the objects sought, which are the security and ease of remedy of creditors of the corporation, and the information of stockholders and creditors, and in any event does not affect the validity of an assignment as between the vendor and vendee, or subsequent purchasers, or attaching creditors, who had actual knowledge or notice of the assignment.<sup>1</sup> But before an assignee's rights can be perfected as against the corporation, so that

allowed except upon a surrender of the certificate held by the party making the transfer; and this appeared upon the face of the certificate. Of the 480 shares over-issued at the time the plaintiffs took their certificates, the certificates of over 350 were, within the next two years, surrendered by the firm, and the stock which they purported to represent transferred on the books of the company to other parties. The plaintiffs held their certificates without calling for a transfer of the stock, and without giving notice to the company, until after the discovery of the fraud of Schuyler in July, 1854, when they made demand on the company to be allowed to transfer the stock to themselves under the power of attorney. The company refusing, they brought an action on the case for damages. It was held, first, that the 90 shares would be presumed to be a part of the 160 genuine shares owned at the time by the firm, in the absence of proof on the part of the defendants to the contrary; second, that, regarding the stock as genuine, the plaintiffs had not lost their right to it, and their right to a transfer of it on the books of the company, by the transfers to a greater amount than the 160 genuine shares made by the Schuylers to other parties on the books of the company, the defendants having by their own by-laws, and by the conditions of their certificates, no right to allow the stock to be transferred except upon a surrender of the certificate; third, that the allowing of the transfer of the stock to other parties on the books of the company was a fraud of the transfer agent, of which the defendants could not take advantage, since the agent was acting within the scope of his official power, and with full knowledge that the stock was owned by the plaintiff, and that their certificate was

outstanding. See also, upon the general proposition stated *supra*, *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Mount Holly Turnpike Co. v. Ferree*, 17 N. J. Eq. 117. The holder of stock, which has been assigned to him for value, is said not to be affected by the "shackles imposed by a *lis pendens*." *Cutting v. Damerel*, 88 N. Y. 410; *Leitch v. Wells*, 48 id. 585.

<sup>1</sup> *People v. Elmore*, 35 Cal. 653; *Johnson v. Underhill*, 52 N. Y. 203; *Smock v. Henderson*, 1 Wils. (Ind.) 241. And this is also the rule where the certificate on its face sets forth that the stock represented thereby is only transferable on the books of the company. *Bruce v. Smith*, 44 Ind. 1. The transfer is valid as between the parties, and a pledgee thereof may sue in his own name to protect his interest, as such, in the property of the corporation, and is not required to act through the corporation. *Johnson v. Canfield*, 26 Minn. 43. The assignee receiving the certificate with a power of attorney, etc., gets the entire interest of the seller, with all his rights. *Underwood v. N. Y. & N. H. R. R. Co.*, 17 How. Pr. (N. Y.) 587; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *N. Y. & N. H. R. R. Co. v. Ketchum*, 3 Keyes (N. Y.), 363. In other words, such an assignment is sufficient to pass the title to the assignee. *Baltimore, &c. R. R. Co. v. Sewell*, 35 Md. 238; *Noyes v. Spaulding*, 27 Vt. 420. The assignee in such a case has at least an equitable title to the stock, and upon its surrender to the corporation, may compel its transfer to him upon the books, and the issue of new certificates. *Halde-man v. Hillsborough, &c. R. R. Co.*, 2 Handy (Ohio), 101.

he can claim a dividend upon the stock, the right to vote, or to exercise other distinctive rights of a stockholder, *he must at least apply to the proper officers of the corporation to have the stock transferred, and a new certificate issued to him*, according to the provisions of the charter, the general law, or the by-laws of the corporation.<sup>1</sup>

In some of the cases, a distinction has been drawn between the effect of a mere assignment of a certificate of stock where the charter or general law requires that, in order to be valid, a transfer must be made upon the books of the company,<sup>2</sup> and one where this requirement is only made by the terms of a by-law of the corporation.<sup>3</sup> But it is quite difficult to see how any distinction can be made between the effect of a statute and a by-law which is made by authority conferred expressly by, and strictly within, the provisions of a statute. A by-law made by the corporation in pursuance of statutory authority, is as effectual as a provision to that effect made in

<sup>1</sup> *Sargent v. Essex Marine Railway*, 5 Gray (Mass.), 373.

<sup>2</sup> *Fisher v. The Essex Bank*, 5 Gray (Mass.), 373; *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Pittsburgh, &c. R. R. Co. v. Clarke*, 29 Penn. St. 146.

<sup>3</sup> *Sargent v. Essex Marine Railway*, *ante*. In *Dickinson v. Central National Bank*, 129 Mass. 279, 37 Am. Rep. 351, this distinction was referred to, and apparently recognized. In that case the owner of stock in a national bank delivered his certificate, with a power of attorney to transfer the stock, as collateral security for a note given by him to a creditor. The by-laws of the bank provided that its stock should only be assignable on its book, subject to the national banking act, and that a transfer-book should be kept, and that the old certificate should be surrendered, and new ones issued. The owner of the stock afterwards went into bankruptcy. On notice to him and his assignee, the payee sold the stock, and the bank refusing the demand of the assignee for a transfer, transferred the stock to the purchaser, and in an action by the assignee against the bank for a conversion of the stock, it was held that it was not liable. The National Banking Act, U. S. Rev. Stat. § 5139, under which all national banks are organized, declares that "the capital stock of each association shall be divided

into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association." It will be observed that the statute makes it imperative that the transfer shall be made upon "the books of the association," and only gives to the association authority to provide by its by-laws, or articles of association, the manner in which the transfer shall be made therein. The court did not pass upon the question as to whether a transfer, valid as against the corporation or third persons, could be made in any other manner; but did hold that the person to whom the new certificate was issued had a good title thereto, as against the assignee in bankruptcy, and therefore that the bank could not be held chargeable as for a conversion of the stock. "As between Pond (the original owner of the stock) and Coes & Co. (the party to whom the note was given and the stock was assigned), the delivery of the certificate," said COLR, J., "as collateral security for a debt due the latter, with a power of attorney to transfer the shares, and execute an assignment of them to any other person, conferred a power coupled with an interest, and gave to any one claiming under an execution of the power, a right to demand of the bank a certificate of the stock."

the charter itself, and if in the case of a charter provision, the public are bound to take notice thereof, so are they equally bound to take notice of a provision of the charter conferring authority upon the corporation to make regulation by its by-laws as to the manner in which its stock shall be transferred, and therefore are put upon inquiry as to the provisions of such by-laws in that regard. The distinction is said to rest upon the evident intention of the legislature. That is, that a statutory provision as to the manner in which stock in a corporation shall be transferred is mandatory, and made for the protection of creditors, etc., as well as for the convenience of the corporation, and that no title thereto can be acquired until its provisions have been complied with;<sup>1</sup> while a by-law made in pursuance of authority conferred by the charter or the general law, is merely for the convenience of the corporation itself.<sup>2</sup> This distinction is not believed to be well founded, and is repudiated in several States, by highly respectable authorities; and the tendency of the later cases is to hold that there is really no distinction in this respect, *and that in the case of attaching creditors either with or without notice of the assignment*, the title of the assignee is good, whether it has been entered upon the books of the corporation or not, agreeably either to the provisions of the charter or general law, or of a by-law of the corporation made in pursuance of statutory authority.<sup>3</sup>

<sup>1</sup> *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Fisher v. Essex Bank*, *ante*. In *Ex parte Murphy*, 51 Wis. 519, it was held that, under § 1751 of the Gen. Stat., no assignment of shares of stock is valid except between the parties, unless it is entered on the books of the company according to the requirements of the statute, and that until this is done an attaching creditor takes priority over the assignee of the stock. In *Stockwell v. St. Louis Mercantile Co.*, 9 Mo. App. 133, it was held that a transfer of stock not entered on the books of the corporation, as required by its by-laws, is not binding on the corporation; but, if a transfer has been refused by the corporation upon demand by an assignee clothed with proper authority to that end, the corporation is liable to him in damages. *Carroll v. Mullanphy Savings Bank*, 8 Mo. App. 249. And equity under such circumstances will protect the rights of the assignee. *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461.

If there is a conflict between the certificate and the by-laws of the corporation as to the mode of transfer, if the mode provided in the certificate is pursued, the company is bound to enter the transfer, although the by-laws provide that a different mode shall be pursued. Such statement in the certificate is a waiver of the provision of the by-laws. *Strange v. Houston, &c. R. R. Co.*, 53 Tex. 162. See also *Holly Springs Bank v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330.

<sup>2</sup> *Sargent v. Essex Marine Railway*, *ante*.

<sup>3</sup> *People v. Elmore*, 35 Cal. 653; *Johnson v. Underhill*, 52 N. Y. 203; *Smock v. Henderson*, 1 Wils. (Ind.) 241; *Continental National Bank v. Elliott National Bank*, U. S. C. C. Mass. May 21, 1881, reported 37 Am. Rep. 353, *n.* Such a statute is held to be confined in its application to the security and ease of remedy of creditors, and for the information of stockholders and creditors, and does not

The object of the statute is attained when subsequent purchasers have notice of the sale and assignment of stock by a particular stockholder; and serious injustice would result, if a strict construction was to be put upon such statute, and purchasers with knowledge of the fact that a person whose name appears upon the books of a corporation has really sold and assigned his stock, were to be given precedence over a prior *bond fide* purchaser, simply because they had been more diligent than he, in procuring an entry of the transfer to them to be entered upon the books of the corporation. Such a construction would be in aid of, rather than in prevention of fraud, and, according to the better class of cases, where a purchaser or attaching creditor has notice of the prior sale and assignment of the stock, he acquires no title thereto, legal or equitable, as against such prior purchaser, although the latter has neglected to have the stock transferred upon the books of the corporation. And, even in those States where it is held that only an equitable title passes, a court of equity will protect the title of the assignee against a subsequent purchaser or execution creditor, where the purchaser or creditor had notice of the pledge or sale of the stock to him;<sup>1</sup> and there can be no

affect, as between the vendor and vendee, the validity of an assignment of the stock; and after such an assignment the vendee assumes and holds to the corporation and its creditors the same relation as the vendor held before the assignment; and if by reason of his neglect to have the stock regularly transferred on the books, the vendor is subjected to liability for any of the debts of the corporation, the vendee is liable to him therefor. *Johnson v. Underhill*, 52 N. Y. 203; *Ross v. Southwestern R. R. Co.*, 53 Ga. 514; *Hill v. Newichawanick Co.*, 48 How. Pr. (N. Y.) 427; *Bruce v. Smith*, 44 Ind. 1; *Leitch v. Welles*, 48 N. Y. 585; *Scripture v. Frankestown Soapstone Co.*, 50 N. H. 571; *Bank of America v. McNeil*, 10 Bush (Ky.), 54; *McNeil v. Tenth National Bank*, 46 N. Y. 325. The rule may be said to be that an assignment of stock, unaccompanied by a transfer upon the books of the corporation, vests in the assignee only an equitable title as against the company, but an *absolute legal ownership* as against the assignor; and this, too, although there is no manual delivery of the certificate. *Grymes v. Hone*, 49 N. Y.

17. The provision for the transfer of stock on the books of the corporation is necessary in order that the officers or agents of the corporation may know on whom to serve notices of the general meetings, and to secure the members against fraud, which otherwise might be perpetrated upon them.

<sup>1</sup> *Colt v. Ives*, 31 Conn. 25. In *Fisher v. Essex Bank*, 5 Gray (Mass.), 373, the creditor who attached the stock had no notice of the sale to the plaintiff; but it is evident, from the language of the court, that if he had been affected with notice thereof, a different rule would have been adopted. In *Cheever v. Meyers*, 52 Vt. 66, a certificate of stock was assigned to secure a loan, but not transferred on the books. A creditor of the assignor of the stock, knowing of the assignment, attached it. It was held that a court of equity not only should, but would, protect the title of the assignee in all cases where the attaching creditor had knowledge of facts which should have put him on inquiry regarding the equitable ownership. See also *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461.

good reason why the same rule should not apply where the *corporation* has notice of such pledge or sale. The only object in requiring such a transfer is for the protection of the corporation, and to enable purchasers to ascertain the title to the stock; and as the corporation is not required by statute to throw its transfer-books open to the inspection of the public, or to any one who has not an interest in its stock, so far as third persons are concerned, it would seem that the object is attained when the proper officers of the corporation have been notified of a change in the title of the stock of a particular stockholder, so that upon inquiry, the state of the title can be ascertained.<sup>1</sup> But in the Massachusetts case before cited,<sup>2</sup> the court intimated that if a formal notice of the assignment, etc., had been given to the proper officers, it would have been of no avail against the attaching creditor. It has been held, however, in New Jersey,<sup>3</sup> that where the stock of a corporation is pledged to the corporation itself for a debt due to it from a stockholder, and an irrevocable power of attorney to transfer the stock is executed to it by the stockholder, the transfer is good against attaching creditors, although the assignment has not been entered upon the transfer-books as required by the charter. The charter in these cases provided that the stock should be transferable on the books, and that "the books of transfer should be kept, and should be evidence of the ownership of such stock in all elections, etc." Now, if the corporation itself is protected by an assignment under these circumstances, it is only upon the ground that the title to the stock might be ascertained upon inquiry of the proper officers, and the same result is attained when the proper officers have notice of an assignment to any person.

As we have seen, it is held in some of the States that an assignment of stock, accompanied by a delivery of the certificates and a power of attorney, passes the legal title to the stock, subject only to any right which the company may have to refuse a transfer, and that a formal transfer upon the books of the company are not essen-

<sup>1</sup> *Sturges v. Knapp*, 31 Vt. 1, 53. As the corporation is deemed a trustee for the stockholders in regard to the capital stock and corporate property, and notice to the trustee of equitable property is sufficient to perfect its delivery, and in those States where the courts hold that a transfer upon the books is necessary to pass the title, it would seem that there can be no doubt but that notice of the

assignment, given to the corporation, without a transfer, would be sufficient in equity. *Dearle v. Hall*, 3 Russ. 1; *Foster v. Blackstone*, 1 My. & K. 297; *Timson v. Ramsbottom*, 2 Keen, 35.

<sup>2</sup> *Fisher v. Essex Bank*, *ante*.

<sup>3</sup> *Hunterdon, &c. Bank v. Nassau Bank*, 17 N. J. Eq. 496; *Broadway Bank v. McElrath*, 13 id. 24.

tial to perfect his title,<sup>1</sup> even where the general law declares that no transfer of stock shall be valid "for any purpose whatever," until it

<sup>1</sup> *Ross v. South Western R. R. Co.*, 53 Ga. 514; *Leitch v. Welles*, 48 N. Y. 585; *Scripture v. Francestown Soapstone Co.*, 50 N. H. 571; *Bruce v. Smith*, 44 Ind. 1; *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Bank of America v. McNeil*, 10 Bush (Ky.), 54. In a case before the United States Circuit Court, Massachusetts, May 21, 1881, — *Continental National Bank v. Elliott National Bank*, 7 Fed. Rep. 369, also reported 37 Am. Rep. 353 *n.*, — a similar question arose, under similar circumstances, except that in the latter case the question arose between an attaching creditor, *having no notice of the assignment*, and the bank; and it was held that the assignment was valid against the attachment. The opinion of LOWELL, J., contains such a careful and thorough review of the question and the authorities that I give it entire. He said: "It is a general rule that creditors, whether they proceed by an attachment on *mesne process*, seizure on execution, creditor's bill, or through an assignee in bankruptcy, must take their debtor's property subject to all equitable, as well as legal, charges, liens, or opposing titles. WILLIS, J., in giving judgment in the Queen's Bench, in 1868, in a case quite analogous to this, against the right of seizing shares of the apparent owner, said that it was a rule applied by that court more than a hundred years before, in the analogous case of the statutory execution under the bankrupt law, that the creditors can have no more than a debtor was entitled to in equity or at law. *Pickering v. Ilfracombe Railway Co.*, L. R. 3 C. P. 235, 251. It has been the law of the Lord Mayor's Court in London, from the time of Richard I., that an equitable assignment of a *chose in action* should prevail against an attachment. *Westoby v. Day*, 2 E. & B. 605. This application of the rule obtains in Massachusetts, and in the United States generally, though a few courts hold otherwise. *Drake on Attachments*, ch. 24; *Thayer v. Daniels*, 113 Mass. 129, and cases cited. The doctrine is so familiar that I will merely cite authorities to show that it is the general rule in Massachusetts as well as elsewhere.

The exceptions to it in this State I will consider afterward. See *Wakefield v. Martin*, 3 Mass. 558; *Dix v. Cobb*, 4 id. 508; *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Kingman v. Perkins*, 105 Mass. 111; *Thayer v. Daniels*, 113 id. 129; *Boston Music Hall Association v. Cory*, 129 id. 435.

"The incorporeal property of the shareholder in a company of this sort is represented by his certificates; and if these are conveyed, the failure to record the conveyance is not evidence of such a constructive fraud as sometimes arises from the possession of chattels after the property has been parted with. On the contrary, it was proved in early cases to be the usage, and is now adopted by the courts as law based on such usage, that the possession of the certificates, with a power to transfer them, is *prima facie* evidence of title; and if in fact the possessor has given value, his title cannot be impeached even by subsequent purchasers who did not receive the certificates, much less by creditors of the transferer. In late cases these certificates are likened to bills of lading, and other *quasi* negotiable securities. See *Black v. Zacharie*, 3 How. (U. S.) 483; *Bank v. Lanier*, 11 Wall. (U. S.) 369; *Johnston v. Laffin* (S. C. U. S.), 23 Alb. L. J. 393; *U. S. v. Vaughan*, 3 Binney, 394, approved in *U. S. v. Cutts*, 1 Sumn. (U. S.) 133; *Finney's Appeal*, 59 Penn. St. 398; *Smith v. Crescent City Co.*, 30 La. An. 1878; *N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *McNeil v. Tenth National Bank*, 46 id. 325; s. c. 7 Am. Rep. 341; *Winter v. Belmont Mining Co.*, 53 Cal. 428; *Fraser v. Charleston*, 11 S. C. 486; *Strong v. Houston R. Co.*, 10 Rep. 28; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; s. c. 24 id. 496; *Prall v. Tilt*, 28 id. 483; *Merchants' Bank v. Richards*, 6 Mo. App. 454; *Conant v. Seneca Co. Bank*, 1 Ohio St. 298; *Duke v. Cahawba Navigation Co.*, 10 Ala. 82; *Ross v. South Western R. Co.*, 53 Ga. 514. In many of the foregoing cases there were laws providing for the transfer of shares upon the books of the company. But the courts held that this registration



shall have been entered upon the books prescribed and in accordance with the law;<sup>1</sup> and the tendency of the cases is to treat certificates

was intended chiefly for the convenience of the company, to enable it to know who should have dividends, and who should vote. No doubt it is sometimes intended as a record of persons liable for the debts of the company, and is so in the case of national banks; but the great weight of authority is that it is not intended for the benefit of creditors of the individual shareholders. Some of the courts hold that the unrecorded transfer passes only an equitable title; others, that it gives a legal title. I assume that by the decisions in the courts of the United States only an equitable title is acquired. That point is unimportant.

"The statutes of many, perhaps of most, of the States, provide that certain conveyances of land and of chattels shall be recorded, and that until record is made, a conveyance shall have no effect excepting between the parties, and in most cases those having actual notice. An attaching or seizing creditor, without notice of a prior conveyance, is undoubtedly within the words of these statutes; and so such creditors have come to be treated, and even spoken of, as in some sort purchasers. A few of the statutes requiring registration of the shares of companies follow the exact language of these registry laws, and declare that no unrecorded title shall be good, except against persons having notice. In California, even, such a law is held not to avail creditors (*Winter v. Belmont Co.*, 53 Cal. 428); but in Maine and Massachusetts, the decision, and perhaps the better one, is that such a law must be construed like other similar registry laws. *Skowhegan Bank v. Cutler*, 49 Me. 315; *Rock v. Nichols*, 3 Allen (Mass.), 342. It was in this state of things that the case which is the support of the defence here was decided. In *Fisher v. Essex Bank*, 5 Gray (Mass.), 373, the charter of a bank incorporated in Massachusetts provided that the shares should be transferred only at the banking-house, and upon the books of the company, and

the court held that an attaching creditor could hold against an earlier unrecorded transfer for value. I have studied this decision with care. It seems to proceed upon the theory that by the charter, which is a public statute, there can be no such thing as an equitable transfer, or, at any rate, none except by a sort of equitable estoppel between the parties; and that it was a part of the intent of the act that a creditor at law should have the legal right to attach the legal title. This decision has been followed in Illinois (*People's Bank v. Gridley*, 91 Ill. 457), but rejected in the other States, so far as their courts have passed upon it. It is sometimes spoken of as being the law of Connecticut and Vermont, but the early cases in the former State are much modified by *Colt v. Ives*, 31 Conn. 25. The case cited from Vermont, *Rice v. Curtis*, 32 Vt. 464, is not in point. It is opposed directly to many of the cases already cited under the third point, and to the general principle that attaching creditors are bound by all equities, including equitable estoppels. It has moreover been seriously modified, if not wholly overruled, in Massachusetts, in *Dickinson v. Central National Bank*, 129 Mass. 279. The Central National Bank had a by-law like that now in question, and A., the owner of ten shares, had transferred them by way of security, precisely as Conant transferred his shares, and afterward became bankrupt. The transferee, still later, sold the shares at public auction, under his power, after due notice to A. and to his assignee. The bank, notwithstanding a notice and demand by the assignee in bankruptcy, transferred the shares to the purchaser. The assignee sued the bank for damages, but was defeated. COLT, J., delivering the opinion of the court, says that *Fisher v. Essex Bank*, *ubi supra*, does not apply, because in that case the charter had the force of a general law; but that a by-law has no such effect (citing *Sargent v. Essex Marine R. Co.*, 9 Pick. 201), and that in

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<sup>1</sup> *Johnson v. Underhill*, 52 N. Y. 203; *People v. Elmore*, *ante*.

of stock, not as negotiable paper strictly, but as possessing a *quasi* negotiable character, and are put upon the same basis as bills of

the absence of such a general law the transferee took an equitable title, which should prevail against the assignee in bankruptcy of the transferor. The only circumstances in *Fisher v. Essex Bank*, not found in *Dickinson v. Central Bank*, are these: (1) The law in the former case contained the word 'only,' — that the shares should be transferred only so and so; (2) that an attaching creditor, and not an assignee in bankruptcy, was concerned; (3) that the law governing the company was a Massachusetts law, which might be differently construed from a national banking act. The first and third points, of course, are the same in this case as in the later one in Massachusetts. The second is not sound in this court; an assignee and attaching creditor stand precisely alike, according to the law which governs this controversy. The doctrine of *Dearle v. Hall*, 3 Russ. 1, confirmed in *Foster v. Cockrell*, 3 Cl. & Fin. 466, is much relied on by the defendants. This doctrine is that of two innocent purchasers of merely equitable interests; he shall be preferred who first gives notice to the trustee or holder of the legal title. To this there are several answers: first, though the corporation is for some purposes a trustee for the shareholders, the latter have an independent legal property in their shares, which they can convey; and whether their actual conveyance is legal or equitable is of no consequence; second, the doctrine applies in England only to purchasers, and not to creditors seizing or attaching, even though a statute gives a right to seize all shares standing in the debtor's name in his own right. The statute was once held by the Queen's Bench to mean that the creditor might seize what the register showed to be apparently the property of the debtor (*Watts v. Porter*, 3 E. & B. 743); but this has been overruled, on the ground that the legislature cannot be supposed to have intended to take one man's property for another man's debt, without the most explicit statement of such a purpose; and therefore the 'right' refers to the equitable as well as legal right. *Dunster v. Lord Glen-*

*gall*, 3 Ir. Ch. 47; *Scott v. Lord Hastings*, 4 K. & J. 633; *Beaven v. Earl of Oxford*, 6 D. M. & G. 524; *Eyre v. McDonald*, 9 H. L. 619; *Robinson v. Nesbitt*, L. R. 3 C. P. 264; *Pickering v. Ilfracombe Railway Co.*, id. 235; *Gill v. Continental Gas Co.*, L. R. 7 Ex. 619. A few courts in this country have carried the doctrine of *Dearle v. Hall* so far as to uphold the garnishment of a non-negotiable debt, which had been equitably assigned without notice. We have already seen that this is not the law in England nor in Massachusetts. Neither is it the law of the United States generally. *Drake on Attachments*, ch. 24; *Cornick v. Richards*, 3 Lea (Tenn.), 1. The Supreme Court of Tennessee in that case refused to extend the rule to shares of stock, though it applies in that State to *choses in action*. As shares are not *choses in action*, and as attaching creditors are not purchasers, *Dearle v. Hall* is not in point.

"It remains only to cite two decisions of the Supreme Court, which, in principle, are decisive of this case. In *Bank v. Lanier*, 11 Wall. 369, a national bank was required to make good to the holder of an unrecorded certificate the value of his shares, although they had been transferred on the books to a subsequent purchaser for value. That purchaser, to be sure, was not before the court, but if his title was better than that of the plaintiff, the bank was justified in transferring the shares, and would have had a perfect defence. *Dickinson v. Central National Bank*, 129 Mass. 279; *Gill v. Continental Gas Co.*, L. R. 7 Ex. 232. If a purchaser for value could not hold against the holder of the unrecorded certificate, *a fortiori* of an attaching creditor. *Bullard v. The Bank*, 18 Wall. (U. S.) 589, is in the same line of thought. It decides that certificates of shares in national banks are so far negotiable, or *quasi* negotiable, that a by-law of the bank which undertakes to make them subject to the debt of the transferor to the bank itself, is void. On the same ground it was held that a by-law like that of the *Elliott National Bank*, if

lading and other similar instruments of a *quasi* negotiable character, which are protected in the hands of an innocent holder for value, against the creditors of the assignor,<sup>1</sup> and all the world, except the corporation itself and a subsequent *bond fide* purchaser without notice.<sup>2</sup> In a New Hampshire case<sup>3</sup> the question as to whether the assignment of a certificate of stock, accompanied with the necessary power of attorney, was sufficient to protect the property of an assignee therein against a subsequent attaching creditor of the assignor, without notice of the assignment, was held to depend upon the circumstance whether the assignee has exercised proper diligence in procuring a transfer upon the books; and that a delay of twenty-seven days after the assignment and delivery of the stock was fatal, as against an attachment made between the date of the delivery and the transfer on the books, by a creditor of the assignor who was ignorant of the assignment; but that, if the evidence of the assignment had been sent by the earliest mail to the keeper of the stock-record to be entered, although not received until after an attachment had intervened, the assignment would have been good against the attachment, as the want of delivery would thereby have been sufficiently explained. But the doctrine of this case, as well as all others holding that, in order to make a complete delivery, the stock must be transferred upon the books,—in our judgment is based upon a misconception of the purposes of the statute requiring such entry, and as to what constitutes a delivery under such circumstances; and, if it is to be construed as having the broad application given to it by the court, it is difficult to see how the question of diligence on

intended to give attaching creditors a better title than transferees who had not recorded their certificates, was void. *Sargent v. Marine Railway Co.*, 9 Pick. (Mass.) 201. Here, again, the argument is *a fortiori*. If the bank cannot create a lien by its by-law, much less can it obtain one indirectly by attachment, upon the construction of an ambiguous by-law."

<sup>1</sup> *Black v. Zacharie*, 3 How. (U. S.) 483; *Smith v. Crescent City Co.*, 30 La. An. 1378; *Bank v. Lanier*, 11 Wall. (U. S.) 369; *United States v. Vaughn*, 3 Binn. (Penn.) 394; *United States v. Cutts*, 1 Sumn. (U. S.) 133; *Duke v. Cahawba Nav'g Co.* 10 Ala. 82; *Finney's Appeal*, 59 Penn. St. 398; *Merchants' Bank v.*

*Richards*, 6 Mo. App. 454. In *Parrott v. Byers*, 40 Cal. 614, the court held that transfers of stock which have not been entered upon the books of the company, as provided by statute, are, nevertheless, valid against all the world, except a subsequent purchaser in good faith without notice. *Winter v. Belmont Mining Co.*, 53 Cal. 428; *Stone v. Marye*, 14 Nev. 362; *Ross v. South Western R. R. Co.*; *Prall v. Tilt*, 28 N. J. Eq. 483; *Fraser v. Charleston*, 11 S. C. 486.

<sup>2</sup> *Parrott v. Byers*, *ante*; *Continental National Bank v. Elliott National Bank*, *ante*.

<sup>3</sup> *Pinkerton v. Manchester, &c. R. R. Co.*, 42 N. H. 424.

the part of the assignee in securing the transfer to be made upon the books, can have any effect. If the legal title passes by the transfer for *one moment*, it passes for all time; and if the assignee is entitled to *one day* in which to procure the transfer to be made upon the books, in the absence of any such provision in the statute itself, upon what principle can it be said that he is not protected for all time, if he establishes the *bona fides* of the transaction?

If the statute requiring an entry of transfers upon the books of the corporation, was intended for the benefit of the creditors of stockholders, why is it that provision is not also made that such creditors may have access to such books? In other words, why are they not made public records? These books are private records, and no person who is not a stockholder can, as a matter of right, have access to them; and if the officers of the corporation refuse to allow a person not a stockholder to inspect them, there is no redress, nor any method by which the corporation can be compelled to permit such inspection. Then of what utility are these transfers to the creditors of a stockholder? Upon what ground can it be said that a failure to enter such transfer upon these records, is a fraud upon the creditors of a stockholder, or is an essential element to constitute a delivery? If the legislature had intended the transfer upon the books for the benefit of the creditors of individual stockholders, it would have gone farther, and provided that such creditors should have access to the books to ascertain the title to the stock; and its failure to do so strengthens the position taken in the later cases, that a transfer upon the books is not essential to pass the legal title in stock to a *bonâ fide* assignee for value, as against the attaching creditors of a stockholder, or indeed against all the world except a subsequent purchaser for value without notice of the assignment; and that the real question in all such cases is, *whether the assignment and power of attorney were executed in good faith for value, and not for a fraudulent purpose*. In a Vermont case<sup>1</sup> the court say: "A sale of the stock, with a transfer of the certificate, indorsed with a power of attorney to the purchaser to make the necessary transfer on the books of the corporation, transfers to the purchaser the equitable and legal right of the vendor in the property, evidenced by the certificate assigned. It completes the transaction between the vendor and purchaser; but as regards the corporation *and those who have a right to look to its records for the ownership of the stock*, the trans-

<sup>1</sup> Cheever v. Meyers, 52 Vt. 66.

action is incomplete." The purchaser does not become vested with the absolute title to the stock, does not become a stockholder in the corporation, until the purchased stock is transferred to him on the books of the corporation. And as, in the absence of any statute conferring such a right, no person who is not a stockholder has a right to examine the books of the corporation, the rule in this case fully sustains the doctrine stated *supra*, that a *bond fide* assignment of certificates of stock for value, accompanied with the necessary power of attorney to transfer them upon the books, transfers the legal title thereto against all the world except the corporation itself.

If the certificate itself contains a statement as to how a transfer may be made, such statement is binding upon the company and constitutes the regulation on the subject; and the company will not be permitted to assert a claim in violation of its own regulations, especially when the violation is a matter essential to the protection of the party against whom the claim is asserted.<sup>1</sup> If the charter confers the power upon the directors to make by-laws, they may also waive compliance therewith.<sup>2</sup> If stock has been transferred in the mode provided by the charter or by-laws to a person having no notice of any claim thereon by the company, it cannot refuse to enter the transfer upon its transfer-books upon the ground that it has a lien thereon, unless such lien is given by the charter.<sup>3</sup> A lien may be given by a by-law,<sup>4</sup> but, except where the purchaser has notice of the lien before his purchase of the stock, or the certificate on its face contains something which should put him upon inquiry as to the existence of a lien thereon, he will not be prejudiced by such lien.<sup>5</sup> A mere assignment of stock, accompanied by delivery of the certificate to the purchaser, is valid between the parties, and also against attaching creditors of the assignor with notice, although no transfer has been made upon the books as required by the charter or by-laws;<sup>6</sup> and the same rule prevails as to an assignee in bank-

<sup>1</sup> Bank of Holly Springs v. Pinson, 58 Miss. 421; 38 Am. Rep. 330; Vansands v. Middlesex Co. Bank, 25 Conn. 144.

<sup>2</sup> Bank of Holly Springs v. Pinson, *ante*.

<sup>3</sup> Union Bank v. Laird, 2 Wheat (U. S.), 390; Steamship Dock Co. v. Heron, 52 Penn. St. 280.

<sup>4</sup> Child v. Hudson Bay Co., 2 P. Wms. 12.

<sup>5</sup> But see Steamship Dock Co. v. Heron, 52 Penn. St. 280.

<sup>6</sup> Sargent v. Essex Marine Ry., 9 Pick. (Mass.) 202; Bullard v. Bank, 18 Wall. (U. S.) 589. It is held in some of the States that an assignment of stock is good as against the attaching creditors of the assignor, where neither the charter nor general law requires a transfer on the books. Boston Music Hall Assoc. v. Cory, 129 Mass. 435; Dickinson v. Central Nat. Bank, id. 279; Kingman v. Perkins, 105 id. 111; Thayer v. Daniels, 113

ruptcy. Thus, the owner of national bank stock delivered his certificate, with a power of attorney to transfer the stock as collateral security for his note. The by-laws of the bank provided that stock was assignable only on its books, subject to the national banking act, and that a transfer-book should be kept, and that the old certificates should be surrendered and new ones issued. The owner of the stock afterward went into bankruptcy. On notice to him and the assignee, the payee sold the stock, and the bank, refusing the demand of the assignee for a transfer, transferred it to the purchasers. The court held that the bank was not liable to the assignee for a conversion.<sup>1</sup> The certificate is merely evidence of the holder's interest in the corporation; his actual interest therein is represented by his "shares of stock," and the certificate is only evidence of such interest, and is by no means conclusive, because the shares may have been levied upon and sold upon execution, so that the certificate represents no value whatever; or the corporation by virtue of its charter may have a lien thereon for its full value; so that the real evidence of a party's property interest in the stock of a corporation is the stock-book of the company. For this reason it is held that an action for conversion, as enlarged by codes, lies for the conversion of the "shares of stock," rather than for the certificates of stock;<sup>2</sup> but the action of trover, as it exists at common law, will lie for a conversion of the certificates of stock; and the rule of damages is the market value of the stock, such certificates being treated as goods, wares, and merchandise.<sup>3</sup>

id. 129. And in *Westoby v. Day*, 2 E. & B. 605, it is said to have been the rule ever since the time of Richard I. that an equitable assignment of a chose in action should prevail against an attachment. In Vermont, *Rice v. Curtis*, 32 Vt. 464; *Cheever v. Myers*, 52 Vt. 66; Illinois, *People's Bank v. Gridley*, 91 Ill. 457; Connecticut, *Colt v. Ives*, 31 Conn. 25; and in Pennsylvania, this rule prevails if the creditor has notice of the assignment; and in some of the cases, if the corporation has notice thereof. *Littell v. Scranton Gas, &c. Co.*, 2 Luz. L. Obs. (Penn.) 82. In *Deane v. Hall*, 3 Russ. 1, which is followed in *Foster v. Cockerell*, 3 Cl. & F. 456, it is held that of two innocent purchasers he shall be preferred who first gave notice to the trustee or holder of the legal title. But as it cannot be presumed that the law, statutory or com-

mon, intends that one man's property shall be taken to pay another man's debts, unless so explicitly stated, it is held that the right extends to the equitable, as well as the legal right. *Scott v. Lord Hastings*, 4 K. & J. 633; *Robinson v. Nesbitt*, L. R. 3 C. P. 264; *Gill v. Continental Gas Co.*, L. R. 7 Exch. 332; *Dunster v. Lord Glengall*, 3 Ir. Ch. 47; *Bickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *Eyre v. McDonald*, 9 H. L. 619; *Beavan v. Earl of Oxford*, 6 De. G. M. & G. 524; *Cornick v. Richards*, 3 Lea (Tenn.), 1.

<sup>1</sup> *Dickinson v. Central Nat. Bank*, 129 Mass. 279; 37 Am. Rep. 351.

<sup>2</sup> *Payne v. Elliott*, 54 Cal. 339; 35 Am. Rep. 80; *Kuhn v. McAllister*, 1 Utah, 273; *Boylan v. Hagnel*, 8 Nev. 352.

<sup>3</sup> *North v. Forest*, 15 Conn. 400; *Tisdale v. Harris*, 20 Pick. (Mass.) 9; *Free-*

In Pennsylvania it is held that trover will not lie for "shares of stock." SHARSWOOD, J., says: "A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation, never realized except upon the dissolution and winding up of the corporation, with the right to receive, in the mean time, such profits as may be made and declared in the shape of dividends. Trover can no more be maintained for a share of the capital stock of a corporation, than it can for the interest of a partner in a commercial firm."<sup>1</sup> In commenting upon this decision, MCKEE, J., in a California case,<sup>2</sup> says: "Upon the idea that shares of stock cannot be taken away or wrongfully detained from the owner, or that they cannot be lost by the owner or found by a stranger, there is no doubt of the soundness of that decision. But the fiction on which the action of trover was founded, namely, that a defendant had found the property of another, which was lost, has become, in the progress of law, an unmeaning thing, which has been by most courts discarded; so that the action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property. It lies for bank notes sealed in a letter;<sup>3</sup> for negotiable instruments;<sup>4</sup> for a judgment;<sup>5</sup> for a promissory note which has been paid;<sup>6</sup> for copies of a creditor's account;<sup>7</sup> for a writ of execution issued on a judgment;<sup>8</sup> and for certificates of shares of stock.<sup>9</sup> At the same time that the action has been thus extended, the words 'things in action' have undergone such a development from their original meaning that they now represent things to the imagination in the light of tangible objects; and as such, they are the subject of contract, sale, gift, mortgage, bailment, and pledge; and under the provisions of our codes they are personal property, subject to taxation, attachment, execution, levy, and sale. *It is, therefore, the 'shares of stock' which constitute the property which belongs to the shareholder.* Otherwise, the property would be in the certificate; but *the certificate is only*

man v. Harwood, 49 Me. 195; Maryland Ins. Co. v. Dalrymple, 25 Md. 242; Boardman v. Cutter, 128 Mass. 388; Somerby v. Buntin, 118 id. 279; Kuhn v. McAllister, 1 Utah, 273.

<sup>1</sup> Neiler v. Kelly, 69 Penn. St. 407.

<sup>2</sup> Payne v. Elliott, 54 Cal. 339; 35 Am. Rep. 80.

<sup>3</sup> Moody v. Keener, 7 Port. (Ala.) 218.

<sup>4</sup> Comparet v. Burr, 5 Blackf. (Ind.) 419.

<sup>5</sup> Hudspeth v. Wilson, 2 Dev. (N. C.) 372.

<sup>6</sup> Pierce v. Gibson, 9 Vt. 216.

<sup>7</sup> Fullam v. Cummings, 16 Vt. 697.

<sup>8</sup> Keeler v. Fassett, 21 Vt. 539.

<sup>9</sup> Anderson v. Nicholas, 28 N. Y. 600; Atkins v. Gamble, 42 Cal. 98; Von Schmidt v. Bourn, 50 id. 616.

*evidence of the property*; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder; *the certificate is but additional evidence of title, and if trover is maintainable for the certificate, there is no valid reason why it is not also maintainable for the thing itself which the certificate represents.*"

SEC. 97. **Liability of Corporations for Refusing to Transfer.** — A corporation has no right to refuse to make a transfer of its stock upon its books, when the assignment is made in due form, and in compliance with the charter, or its by-laws,<sup>1</sup> unless there is a reasonable ground for such refusal, — as that the corporation has a lien upon the shares, and its by-laws provide that no transfer shall be made until it is discharged;<sup>2</sup> or that the stock has already been transferred to another party under a regular transfer from the assignor;<sup>3</sup> or that it has been attached in a suit against the assignor;<sup>4</sup> or indeed any reasonable ground. It would be imposing a great hardship upon a corporation, as well as working a serious injustice, if it became amenable to an assignee of stock, in damages, for a refusal to transfer it upon its books, when it had any *reasonable* ground for such refusal. Thus, as a corporation is liable to the owner if it registers a forged transfer of stock,<sup>5</sup> if it has a reasonable doubt as to the genuineness of the

<sup>1</sup> Webster v. Upton, 91 U. S. 65; People v. Crockett, 9 Cal. 112.

<sup>2</sup> Mechanics' Bank v. Merchants' Bank, 45 Mo. 513; Purchase v. N. Y. Exchange Bank, 3 Robt. (N. Y.) 164; German Security Bank v. Jefferson, 10 Bush (Ky.), 326; Matter of Bigelow, 2 Ben. (U. S. C. C.) 469; Guyer v. Western Ins. Co., 3 Pittsb. (Penn.) 41.

<sup>3</sup> State v. Warren Foundry, &c. Co., 32 N. J. L. 439.

<sup>4</sup> State Ins. Co. v. Sax, 2 Tenn. Ch. 507; Williams v. Mechanics' Bank, 5 Blatch. (U. S. C. C.) 59.

<sup>5</sup> In Sim v. Anglo-American Tel. Co., 42 L. T. Rep. n. s. 37, it was held that the registration of a transfer of stock and the issue to the transferee of a certificate does not give the transferee as against the company a right by estoppel to the stock. B. & Co. purchased upon the stock exchange £5,000' stock in the defendant company. A transfer of the stock purporting to be executed by C., the owner of the stock, was lodged with the company by S. & Co., the nominees of B. & Co.

The company, after making the usual inquiry, registered S. & Co. as holders. Afterward B. & Co., having agreed to deposit the stock with plaintiff to secure advances, caused S. & Co. to execute a transfer to plaintiffs, who were accordingly registered, and received a certificate from the company. Plaintiffs subsequently being repaid their advances, had no beneficial interest in the stock, but held as trustees for B. & Co. The company having discovered that the alleged transfer from C. to S. & Co. was a forgery, replaced C.'s name upon the register, and refused to pay dividends to plaintiffs, or to acknowledge their title to the stock. In an action against the company, it was held (reversing the judgment of LINDLEY, J.), that inasmuch as B. & Co. were the real plaintiffs, the company were not estopped from denying the validity of the transfer from C. The company are not bound on behalf of the transferee to make inquiry of the transferor before registering the transfer.



transfer it may refuse to enter it, until its genuineness is reasonably established. It may be said that, in addition to any discretion expressly conferred on them by the articles of association, the directors of a company have vested in them a discretion to refuse to register a transfer of shares in cases where the proposed transfer would be contrary to the interests of the shareholders. Such discretion is, however, not arbitrary, but must be exercised in a just and reasonable manner. Thus, where a company was in difficulties, and a transfer was made to a person whose address was incorrectly given in the transfer, and who could not be found, it was held that the directors were justified in refusing to register the transfer; and the court refused, after a winding-up order had been made, to rectify the register by inserting the name of the transferee, it appearing that the transfer was made for the purpose of avoiding liability, and that the transferee was not a person of means.<sup>1</sup> But they have no right to refuse a transfer because in their judgment the motives and purposes of the parties are improper, or because the transfer may injuriously affect the company.<sup>2</sup> And when stock is regularly assigned by one having authority to assign it, it not only may, but should transfer it upon its books. "We see no principle," says MORTON, C. J.,<sup>3</sup> "upon which it can be held that by merely recording the transfer and issuing a new certificate in accordance with it, the defendant is guilty of negligence which renders it liable to the estate for the stock or its value in any form of action. When a transfer of its stock is presented to a corporation, it is bound at its peril to see that it is a genuine transfer by one who has the power of disposition over the stock.<sup>4</sup> If it issues a new certificate upon a forged or unauthorized transfer, the real owner retains his property in the stock, and the corporation may also be liable to a *bond fide* holder of the new certificate. *But when a transfer, by one who has the full power to transfer, is presented, it has the right to act upon it, and it is not its duty to inquire into the purposes of the parties, or to investigate the question whether the transaction is in good faith or is fraudulent.* Rand, as executor, had the full power of disposing of this stock; there is nothing in the will restricting his general authority as executor as to it; he had the

<sup>1</sup> *In re Smith*, L. R., 6 Eq. 238.

<sup>2</sup> *State v. McIver*, 2 S. C. 25; *State v. Smith*, 48 Vt. 266.

<sup>3</sup> *In Crocker v. Old Colony R. R. Co.* (Mass. Supreme Ct., July, 1884,) 30 Abb. L. J. 495.

<sup>4</sup> *Sewell v. Boston Water Power Co.*,

4 Allen (Mass.), 277; *Merriam v. Boston, Clinton & Fitchburg R. R.*, 117 Mass. 241; *Pratt v. Taunton Copper Co.*, 123 id. 110.

power and right to sell it or to pledge it for the purposes of the estate. The defendant took care to inform itself of the authority of Rand, and knew the relation of heir and legatee which Dillon sustained toward the estate. We do not think it was bound to go further and ascertain at its peril whether the transaction between Rand and Dillon was in fraud of the estate."<sup>1</sup>

The corporation is entitled to refuse a demand of an equitable owner of shares for a transfer, where he does not offer to surrender the certificates, but they are known to the officers of the company to be in possession of another person claiming to be the lawful owner.<sup>2</sup> A mere notice to the officers of the company, from parties having a beneficial interest in the stock sought to be transferred, that the right of the party having the legal title to make the transfer is questioned and will be contested, will not justify the officers in delaying longer than to give a reasonable time to the claimants to institute legal proceedings.<sup>3</sup> The corporation has a right to refuse a transfer, unless the old certificate is surrendered; because, if a new certificate is issued without a surrender of the old one, and the legal title still remains in the original holder, the corporation will be compelled either to restore him to his rights as a stockholder, and account to him for the dividends, etc., paid upon the stock, or to respond in damages for the loss.<sup>4</sup> In a Texas case<sup>5</sup> the by-laws of a corporation provided that

<sup>1</sup> *Hutchins v. State Bank*, 12 Met. (Mass.) 421.

<sup>2</sup> *National Bank v. Lake Shore, &c. Ry. Co.*, 1 Ohio St. 221.

<sup>3</sup> *State v. McIver*, 2 S. C. 25.

<sup>4</sup> In *Cleveland & Mahoning R. R. Co. v. Tappett*, Ohio, S. C., 1880, it appeared that on the 9th of September, 1854, the Cleveland & Mahoning Railroad Company issued to V. certificates of its capital stock. The certificates declared upon their face that the stock was transferable on the books of the company upon the surrender of the certificates. On the 16th of September, 1854, the stock was sold to F. by V., who delivered to him the certificates with blank powers of attorney to enable him to have the stock transferred. The certificates were mislaid by F., and were not discovered until December, 1871.

In the mean time, on May 8, 1863, the board of directors of the railroad company, on the application of V., issued to B. & P., to whom V. assumed to sell the stock, new certificates of stock, on the supposition that the original certificates had been lost by V. On the application of the administrators of F. for a transfer of the stock to their names, and for an account of the dividends, the company refused the application on the ground of the issue of the new certificates to B. & P. The by-laws provided that no new certificates should be issued in place of any certificate previously issued, until such previous certificate was surrendered and cancelled. There was also provision in the by-laws that certificates might be issued on the special order of the board of directors, in the place of certificates lost or destroyed, on

<sup>5</sup> *Strange v. Houston, &c. R. R. Co.*, 53 Tex. 162. See also to the same effect, *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461.

a transfer of its stock should be made in writing, and that upon the presentation of such transfer with the certificate to the secretary, a new certificate should be issued to the assignee; and the certificates of stock contained a provision to the like effect. B., the owner of stock, transferred the same with the certificate to F., from whom plaintiff received a transfer with the certificate for value. B. subsequently transferred the stock for value to M., but without the certificate. The corporation issued a new certificate of the stock to M. It was held that the corporation was liable to plaintiff for the value of the stock; even though the record in the books of the company showed title to the stock in M. at the time plaintiff purchased the certificate. The records of the corporation were not constructive notice to persons dealing in its stock.

This liability is predicated upon the ground that the company is the custodian of the rights of a stockholder, and therefore responsible for the illegal issue of stock to their prejudice;<sup>1</sup> and when a person seeks to have stock transferred without the production of the certificate, the company is thereby affected with notice that a superior title may exist in a third person.<sup>2</sup> But if a corporation has used due care in making a transfer, and it turns out to have been made to a

proof of such loss and destruction, and on receiving security to indemnify the company against loss consequent upon the issuing of such new certificates. It was held that the issuing of the new certificates to B. & P., and the allowing the transfer of the stock to them was a breach of the duty which the company owed to F. as the holder of the original certificates, and this breach of duty created a liability on the company to replace the stock to which F. was entitled, or to account for its value. The issuing of the certificates, under the by-law providing for the issue of certificates in place of such as may have been lost or destroyed, does not affect the liability of the company to F., as the holder of the original certificate. The object of the by-law is to enable persons, whose certificates appear to have been lost or destroyed, to obtain others, on indemnifying the company against loss, in case other parties should assert rights against the company under the original certificates; but does not affect the rights of such parties. The company is not liable for the dividends paid on the stock, before it had

notice of the transfer of the certificates to F. Unlike the transfer of the stock, the surrender or production of the certificates was not necessary to draw the dividends. Until the company was notified of the transfer of the certificates, it was warranted in paying the dividends to V., the registered owner, or to his order, and by paying the dividends to B. & P. as purchasers under V., the company is as fully protected as if the payments had been made to V. directly. Until the transfer of the stock to the holders of the original certificate was refused, or they had notice of the transfer of the stock to other parties, the statute of limitations did not begin to run.

<sup>1</sup> *Bayard v. Bank*, 52 Penn. St. 234; *Bridgeport Bank v. New York & New Haven R. R. Co.*, 30 Conn. 231; *New York, &c. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Bank v. Lanier*, 11 Wall. (U. S.) 369; *Pratt v. Taunton Copper Co.*, 123 Mass. 110; *Loring v. Salisbury Mills*, 125 Mass. 150.

<sup>2</sup> *Bayard v. Bank*, *ante*; *N. Y., &c. R. R. Co. v. Schuyler*, 34 N. Y. 81.

party not entitled thereto, it is not estopped from denying its validity. Thus in an English case<sup>1</sup> C., the plaintiff in the second action, had been since 1875 the proprietor of certain stock in the London and South Western Railway Company. P., the confidential clerk of C., feloniously got possession of a certificate for £1,000. of the stock and sold that amount. Subsequently he forged C.'s name to the transfer, and forwarded it, together with the certificate, to the brokers of Major W., the plaintiff in the first action, who had purchased the stock from T., a member of the Stock Exchange. The brokers forwarded the transfer and the certificate to the company for registration. The company thereupon wrote to C. at his usual address, inquiring if the transfer were correct. The letter was intercepted by P., who replied in a way which appeared not quite satisfactory. The company forwarded a second letter, which was also intercepted by P., who gave the company an explanation with which they were satisfied, and they immediately sent a new certificate to Major W.'s brokers. The fraud was subsequently discovered, and now Major W. sought to recover from the company on the ground that *inter alia* he was entitled to rely upon the certificate of registration, which the company were estopped from questioning, as he, Major W., relying upon it had so prejudicially altered his position as to bring the case within the authorities upon estoppel. The plaintiff in the second case sought to have his name replaced in the books of the company as the owner of the said stock. It was held that the company having issued the certificate without any want of care and *bona fide* were not estopped from contesting its validity, and that upon the facts, the judgment must be for the defendants in the first action, and for the plaintiff in the second action, with costs.

Where a person fraudulently procures a transfer of stock to be made to him, *he* is liable to the corporation for all damages resulting therefrom. Thus A. owned five shares of stock in the plaintiff railroad company. Defendants purchased the shares from a broker who was in possession of the certificate, and a forged signature to a power of attorney purporting to authorize their transfer. On the faith of this power of attorney plaintiff transferred the shares to defendants and issued to them a certificate. Subsequently plaintiff transferred the shares to a purchaser from defendants, at their request, and issued to the purchaser a new certificate. Plaintiff was afterward compelled

<sup>1</sup> *Waterhouse v. London & S. E. Railway Co.*, 41 L. T. N. s. 553, and *Coates v. same*, id. (Q. B. Div.).

to procure for A. five shares of stock and to pay her accrued dividends. It was held that plaintiff was entitled to recover of defendant the value of the stock and dividends. A. never parted with her property in the shares, and therefore the plaintiff was obliged to procure shares for her and also pay her the dividends.<sup>1</sup> But it has no remedy against the person who purchased the stock of the transferee, because, as to him, the corporation is estopped from denying the validity of its certificate.<sup>2</sup> What is a reasonable ground for refusing to enter a transfer, must necessarily depend upon the facts of each case, and is a question for the jury. In an action for wrongfully refusing to transfer, the measure of damages is the value of the stock at the time of the demand, with interest.<sup>3</sup>

SEC. 98. **Remedies for Refusal to Transfer.** — It is now quite common to apply for a mandamus to compel a transfer of stock by a corporation, and the issue of a new certificate; and this remedy is sustained by a very respectable class of cases,<sup>4</sup> especially where the party cannot have a complete remedy at law. But where the remedy at law is ample, the writ will not be granted.<sup>5</sup> The ordinary remedy for a wrongful refusal by the corporation to enter a transfer upon its

<sup>1</sup> *Boston & Albany R. R. Co. v. Richardson* (Mass. S. C. 1884); *Pratt v. Taunton Copper Co.*, 123 Mass. 110.

<sup>2</sup> *Machinist Bank v. Field*, 126 Mass. 345. A warranty of title is implied in the sale of a chattel, unless the circumstances are such as to give rise to a contrary presumption. *Shattuck v. Green*, 104 Mass. 42. The possession of and offer to sell a chattel is held equivalent to an affirmation that the seller has title to it. This is founded upon the reason that men naturally understand that a seller who offers a chattel for sale owns it. The same rule has been extended to the case of a sale of a promissory note. The seller impliedly warrants that the previous signatures are genuine. *Cabot Bank v. Merten*, 4 Gray, 156; *Merriam v. Walcott*, 3 Allen (Mass.), 258. So it has been held that if one, honestly believing himself to be authorized, acts as agent for another and procures money or goods upon the credit of his supposed principal, and it turns out that he is not authorized, he is liable for the value of the money or goods. *Jefts v. York*, 10 Cush. (Mass.) 392. In numer-

ous other cases the remedy is said to be an action on the case for falsely assuming to be an agent. *Bartlett v. Tucker*, 104 Mass. 336; *May v. Western Union Tel. Co.*, 112 id. 90. See also *Sim v. Anglo-American Tube Co.*, L. R. 5 Q. B. D. 188; *Hambleton v. Central Ohio R. R. Co.*, 44 Md. 551; *Brown v. Howard Ins. Co.*, 42 id. 384.

<sup>3</sup> *Baltimore, &c. R. R. Co. v. Sewell*, 35 Md. 238.

<sup>4</sup> *King v. Worcester, &c. Canal Co.*, 1 Man. & R. 529; *Queen v. Shropshire Union R. R. Co.*, L. R. 8 Q. B. 420; *Regina v. Liverpool, &c. Railway Co.*, 16 Jur. 949; *Townsend v. McIvers*, 2 S. C. 25; *People v. Crockett*, 9 Cal. 112; *Busey v. Hooper*, 35 Md. 15.

<sup>5</sup> *Murray v. Stevens*, 110 Mass. 95; *State v. Rombauer*, 46 Mo. 155; *State v. Guernero*, 12 Nev. 105; *Birmingham Fire Ins. Co. v. Com.* 92 Penn. St. 72; *Wilkinson v. Providence Bank*, 3 R. I. 22; *State v. Warren Foundry, &c. Co.*, 32 N. J. L. 439; *King v. Bank of England*, Doug. 524. See Chapter on MANDAMUS.

books is by an action on the case for damages.<sup>1</sup> But in a proper case a court of equity will compel both a transfer and the issue of a new certificate.<sup>2</sup>

SEC. 99. **Pledge of Stock.** — Shares of stock may be hypothecated by a written assignment thereof, notwithstanding the legal title is transferred to the pledgee;<sup>3</sup> but this can only be done by a delivery of the certificates duly assigned.<sup>4</sup>

This method of using stocks as collateral security for loans has entered largely into the business of the country, and it is now common to stipulate for the sale of such stock upon default, at the stock board, or at public sale, or otherwise, so that the legal title freed from all equities can be passed to the purchaser. Formerly it was held that sales could only be made at public auction,<sup>5</sup> unless there was a stipulation that it might be sold at the board of brokers.<sup>6</sup> But where no provision is made as to the time or mode of sale, there must be a demand of payment, and a sale at public auction, of the time and place of which the pledgor must be notified.<sup>7</sup> But it seems that the pledgor may by his conduct be estopped from objecting to a sale otherwise made. Thus, the defendant deposited stock with a banking association in the city of New York, as collateral security to his note, giving the association, by the terms of the note, power to sell in case of non-payment of the note, without stating any restriction as to manner of sale. It was held that a sale at the board of brokers, on a two days' notice to defendant, he not objecting, was binding upon him.<sup>8</sup> But in the absence of any facts amounting to an estoppel, or agreement warranting it, the stock must be sold at public sale as stated *supra*. Thus, the pledgee of stock, under a general hypothecation, without any specification of time of redemption, or power or mode of selling, after having repeatedly called on the pledgor to redeem, and apprised him of intention to sell, and having offered the stock without success at the

<sup>1</sup> *Murray v. Stevens*, *ante*; *Commercial Bank, &c. v. Kortright*, 22 Wend. (N. Y.) 348.

<sup>2</sup> *Pollock v. National Bank*, 7 N. Y. 274; *Chew v. Bank of Baltimore*, 14 Md. 299; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211; *Buffalo, &c. R. R. Co. v. Dudley*, 14 id. 336; *Wilson v. Atlantic, &c. R. R. Co.*, 2 Fed. Rep. (U. S.) 459.

<sup>3</sup> *Vaupiel v. Woodward*, 2 Sandf. Ch.

(N. Y.) 143; *Wilson v. Little*, 2 N. Y. 443.

<sup>4</sup> *Lallande v. Ingram*, 19 La. An. 364; *Lewis v. Graham*, 4 Abb. Pr. (N. Y.) 106.

<sup>5</sup> *Brown v. Ward*, 3 Duer (N. Y.), 660.

<sup>6</sup> *Costello v. City Bank*, 1 N. Y. Leg. Obs. 25; *Rankin v. McCullough*, 12 Barb. (N. Y.) 103.

<sup>7</sup> *Brown v. Ward*, *ante*.

<sup>8</sup> *Willoughby v. Comstock*, 3 Hill (N. Y.), 389.

board of brokers, sold it at private sale without notice to the pledgor of the time and place. It was held that the sale was unauthorized, and the fact that the pledgor was avowedly unable to redeem did not affect his right.<sup>1</sup>

Where the owner of stock delivers the certificate to his pledgee, with a power to transfer it, the fact that his name is in the certificate is not notice of his rights, as against third persons who take it for value from the pledgee.<sup>2</sup> But where a person purchased stock of a corporation at a sheriff's sale, knowing that the certificates of such stock had been previously hypothecated,—he was held chargeable with notice of the fact, and took the stock subject to the claim of the pledgee.<sup>3</sup> An agreement whereby the maker of notes delivers certificates of stock as collateral security for the payment of the notes, stipulating that if the notes are not paid at maturity the securities shall be under the control of the holder, who is authorized to dispose of them and to apply the proceeds to the credit of the maker,—is a pledge of the stocks, and not a mortgage.<sup>4</sup> A transfer of shares by a member of an association, as collateral and additional security to a bond and mortgage executed by him to the society as security for a loan, is in the nature of a pledge rather than of a chattel mortgage; the shares remain the property of the shareholder for every purpose except that of defeating the lien of the association, the holder exercising every other control over them. The principle is applied wherever a stockholder pledges his stock to the corporation of which he is a member. He retains his rights of membership.<sup>5</sup>

Where an indorser of promissory notes held by a bank, as security for such liability transferred twenty shares of its stock, on the books of the bank, to the cashier, and it appeared that assignments and transfers of the stock to the bank, or in pledge to it, or as security for debts and liabilities to it, were invariably, by the usage of the bank, made in the same manner as the transfer in question, it was held that such transfer vested the legal title to the shares so transferred, not in the cashier in his own right, but in the bank. The liability of a person as the indorser of a promissory note, to

<sup>1</sup> Willoughby v. Comstock, 3 Hill (N. Y.), 389; Costello v. City Bank, 1 N. Y. Leg. Obs. 25.

<sup>2</sup> Felt v. Heye, 23 How. Pr. (N. Y.) 106.  
359.

<sup>3</sup> Weston v. Bear River, &c. Mining Co., 6 Cal. 425.

<sup>4</sup> Lewis v. Graham, 4 Abb. Pr. (N. Y.)

<sup>5</sup> Mechanics' Building & Loan Association v. Conover, 14 N. J. Eq. 219.

the holder, is a sufficient consideration to support a transfer of bank shares by the former, as security to the latter for such liability.<sup>1</sup> In order to operate as a lien upon stock, there must be facts which show such to have been the intention of the parties. Thus, A. and B. were directors in a company, in which no shareholder could act as a director without holding ten shares. Being intimate friends, the latter advanced to the former several sums. At the time of the last loan, A. delivered to B. an order upon the secretary of the company to transfer A.'s ten shares into B.'s name. B. did not then make use of the order, and A. continued to act as director until his death several years after, insolvent, when a suit was instituted for the administration of his assets. B. then served the order of transfer on the secretary, and presented his petition in the suit, claiming an equitable lien on A.'s ten shares for the amount of his advances, with interest. It was held that these circumstances were not sufficient to show an intention to create a lien on the shares, and consequently B.'s claim was rejected.<sup>2</sup>

In another case, a subscriber for 90 bank shares of \$100 each, paid \$2,750 towards an instalment of 80 per cent and drew a draft in favor of the bank for the balance, and transferred to the bank all his right, &c., in his shares (excepting and reserving the sum he had paid in money), as collateral security for payment of the draft. The draft was not paid, nor did the bank pass to the subscriber's credit any stock, nor give him any certificate of shares. It was held that the subscriber was once-an owner of the shares, and that the effect of the reservation of his conveyance to the bank was, that an amount equal to 34 shares, of the par value of \$80 a share, remained his property, and was liable to be sold on an execution against him. The application, by the bank, of the \$2,750 to an account of the subscriber which was independent of the shares, was held to be unauthorized, and not to affect his title to the shares.<sup>3</sup>

A bill in equity may be brought to redeem stock hypothecated for a loan by an assignment absolute in its terms, upon parol proof that the transfer was in reality made only as collateral security for a debt.<sup>4</sup>

<sup>1</sup> *Stamford Bank v. Ferris*, 17 Conn. 259.

<sup>2</sup> *Cumming v. Prescott*, 2 You. & C. Exch. 488.

<sup>3</sup> *Hussey v. Manufacturers, &c. Bank*, 10 Pick. (Mass.) 415.

<sup>4</sup> *Newton v. Fay*, 10 Allen (Mass.), 505.



## CHAPTER VII.

### MUNICIPAL SUBSCRIPTIONS.

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| <p><b>SEC. 100.</b> Power to Subscribe, how Conferred, etc.</p> <p>101. Power must be exercised in Conformity with the enabling Act: Estoppel.</p> <p>102. Recitals in Bonds, effect of.</p> <p>103. Negotiable Quality of Bonds.</p> <p>104. <i>Bond fide</i> holders, Who are: Rights of.</p> <p>105. Submission to Popular Vote, when necessary: Consents, Petitions, etc.</p> <p>106. Rule where Authority is given in Charter of Railroad Company, etc.</p> <p>107. Where two Acts confer Authority.</p> <p>108. Out of what Fund should be paid.</p> <p>109. Majority, two-thirds Vote, etc.</p> <p>110. Who should make Subscriptions.</p> <p>111. Denomination of Bonds.</p> <p>112. By whom Bonds should be executed.</p> <p>113. Ratification by Legislature, etc.: Effect of.</p> <p>114. General and special Statute authorizing: Effect of.</p> <p>115. Issuing Bonds instead of paying Money.</p> <p>116. Sale below Par.</p> | <p><b>SEC. 117.</b> What constitutes a Subscription.</p> <p>118. Relation of municipal Corporations as Stockholders.</p> <p>119. Conditional Subscriptions and Bonds.</p> <p>120. Municipality estopped from Denying that Condition is performed, when.</p> <p>121. Surveys, what amounts to.</p> <p>122. Substitution of Bonds, when may be made: general Powers.</p> <p>123. Effect of Consolidation.</p> <p>124. Change of Constitution, etc.: Effect of.</p> <p>125. Effect of Division of County, Town, etc., after Bonds are issued.</p> <p>126. Defences to Actions upon Bonds.</p> <p>127. Evidence in Actions to enforce payment of Bonds.</p> <p>128. <i>Mandamus</i> to compel issue of Bonds, etc.</p> <p>129. Remedy to annul Bonds, etc.</p> <p>130. Municipal Corporation may enforce delivery of Stock when.</p> <p>131. Remedy of Taxpayer against issue of illegal Bonds, etc.</p> <p>132. Remedies against Municipal Corporation relative to invalid Bonds.</p> <p>133. Rules of construction adopted in United States Court.</p> |
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**SEC. 100. Power to Subscribe, how Conferred, etc.**—Municipal corporations, as counties, cities, and towns, have no authority either to subscribe for the stock of a railroad company, or to make any donations to it by grant or otherwise, *except where the legislature expressly confers such authority upon them.*<sup>1</sup> Although the question has been

<sup>1</sup> Louisville Valley R. R. Co. v. Fairfield, 51 Vt. 257; French v. Teschemaker, 24 Cal. 518; Lewis v. Clarendon, 5 Dill. (U. S. C. C.) 324; Copes v. Charleston, 10 Rich. (S. C.) 491; Pitzman v. Freeburg, 92 Ill. 111; Barnes v. Lacon, 84

obstinately litigated at every point, it may now be said that, except in those States where the constitution expressly prohibits it, the legislature has power to confer upon these corporations the right to aid railroad or other *quasi* public corporations either by subscriptions to their stock or by way of gratuity.<sup>1</sup> It is true that some legal

id. 461; *Kenicott v. Supervisors*, 16 Wall. (U. S.) 452; *Wells v. Supervisors*, 102 U. S. 625; *Brodie v. McCabe*, 33 Ark. 690; *South Ottawa v. Perkins*, 94 U. S. 260; *Taxpayers of Milan v. Tenn. Central R. R. Co.*, 11 Lea (Tenn.), 329; *Delaware County v. McClintock*, 51 Ind. 325; *Hasbrouck v. Milwaukee*, 13 Wis. 37; *Penn. R. R. Co. v. Philadelphia*, 47 Penn. St. 189; *Jeffries v. Lawrence*, 42 Iowa, 498; *Sykes v. Columbus*, 55 Miss. 115; *People v. Mitchell*, 35 N. Y. 551; *Lewis v. Shreveport*, 3 Woods (U. S. C. C.), 205; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384; *Gelpcke v. Dubuque*, 1 id. 220; *Rogers v. Bridgeport*, 3 Wall. (U. S.) 364; *Thompson v. Lee County*, 3 id. 327; *St. Joseph Township v. Rogers*, 16 id. 644; *Lafayette, &c. R. R. Co. v. Geiger*, 34 Ind. 85; *Lafayette v. Cox*, 5 Ind. 38; *Harvey v. Indianapolis, &c. R. R. Co.*, 32 id. 244. But the authority must be expressly conferred, and cannot rest on inference or implication. Thus, a clause in a railroad charter providing that the agent of any corporate body may subscribe for its stock is held to be confined to private or business corporations, and does not embrace municipal. *Campbell v. Paris, &c. R. R. Co.*, 71 Ill. 611; *East Oakland v. Skinner*, 94 U. S. 255. A provision which prohibits the creation of an indebtedness by a *direct* loan of municipal credit does not permit the *indirect* use of such credit for the same purpose. An act forbidding, under certain penalties therein prescribed, the officers of a municipality, in its behalf, to loan the credit thereof, or donate to or subscribe stock in any railroad or other company, without the previous assent of two-thirds of the qualified voters, is merely prohibitory in its character, and confers no authority on those officers when such assent was given. And it was held that the bonds of a town of a certain date, reciting that they are "issued in pursuance of an election held in said town

to decide whether said town should purchase and donate to the St. Louis, Kansas City, and Northern Railway Co. two hundred acres of land for machine-shop purposes, the result of said election being two hundred and twenty-eight votes for the purchase and donation, and one vote against, and in pursuance of orders of the board of trustees of the inhabitants of the town, which orders were made in accordance with" an act, &c., authorizing cities and towns to purchase lands, and to donate, lease, or sell the same to railroad companies, are void. *Jarrett v. Maberly*, 103 U. S. 580.

<sup>1</sup> *Bennington v. Park*, 50 Vt. 178; *Perry v. Keene*, 56 N. H. 514; *Opelika v. Daniel*, 59 Ala. 211; *Taylor v. Ypsilanti*, 105 U. S. 60; *Brokaw v. Gibson Co.*, 73 Ind. 543; *Williams v. Hall*, 65 id. 129; *Bittinger v. Bell*, 65 id. 445; *First National Bank of St. Johnsbury v. Concord*, 50 Vt. 257; *Riddle v. Philadelphia, &c. R. R. Co.*, 1 Pittsb. (Penn.) 158; *Quincy, &c. R. R. Co. v. Morris*, 84 Ill. 410; *Chicago, &c. R. R. Co. v. Morris*, 62 id. 268; *Chicago, &c. R. R. Co. v. Aurora*, 99 Ill. 205; *Hickory v. Ellery*, 103 U. S. 423; *Amoskeag National Bank v. Ottawa*, 105 U. S. 267; *Indiana, &c. R. R. Co. v. Attica*, 56 Ind. 476; *Rock Creek v. Strong*, 96 U. S. 271; *Stevens v. Anson*, 73 Me. 489; *Lyons v. Chamberlain*, 86 N. Y. 578; *Selma, &c. R. R. Co., ex parte*, 45 Ala. 696; *Hill v. Com'rs of Forsyth Co.*, 67 N. C. 367. The validity of such statutes has also been sustained in the following cases; *Rogers v. Burlington*, 3 Wall. (U. S.) 327; *Havemeyer v. Iowa Co.*, 3 id. 294; *Seybert v. Pittsburgh*, 1 id. 272; *Gelpcke v. Dubuque*, 1 id. 175; *Mitchell v. Burlington*, 4 Wall. (U. S.) 270; *Von Hoffmann v. Quincy*, 4 id. 535; *Campbell v. Kenosha*, 5 id. 194; *Van Hastrup v. Madison*, 1 id. 291; *Supervisors v. Schenck*, 5 id. 772; *San Antonio v. Gould*, 34 Tex. 49; *Goodin v.*

writers<sup>1</sup> have seriously combated this position; but, while their theories are nicely drawn, they do not commend themselves to the

Crump, 8 Leigh (Va.), 120; Clark v. Janesville, 10 Wis. 136; Bushnell v. Beloit, 10 id. 195; Fisk v. Kenosha, 26 Wis. 23; Phillips v. Albany, 28 id. 340; Rogan v. Watertown, 30 id. 259; Lawson v. Milwaukee, &c. R. R. Co., 30 id. 597; Shelby County Court v. Cumberland & Ohio R. R. Co., 8 Bush (Ky.), 209; Maddox v. Graham, 2 Met. (Ky.) 56; Police Jury v. McDonough, 8 La. An. 341; Parker v. Scoggin, 11 La. An. 629; Augusta Bank v. Augusta, 49 Me. 507; Davidson v. Ramsey County, 18 Minn. 482; St. Louis v. Alexander, 23 Mo. 483; St. Joseph and Denver R. R. Co. v. Buchanan County, 39 id. 485; State v. Macon County Court, 41 id. 453; Chilli-cothe & Brunswick R. R. Co. v. Brunswick, 44 id. 553; State v. Linn County Court, id. 504; State v. Greene County, 54 id. 540; State v. Sullivan County Court, 51 id. 522; Osage Valley, &c. R. R. Co. v. Morgan County, 53 id. 156; Smith v. Clark County, 54 id. 58; Gibson v. Mason, 5 Nev. 283; Benson v. Albany, 24 Barb. (N. Y.) 248; Clarke v. Rochester, 28 N. Y. 605; People v. Mitchell, 45 Barb. (N. Y.) 208; People v. Mitchell, 35 N. Y. 551; People v. Batcheller, 53 id. 128; Caldwell v. Burke County, 4 Jones Eq. (N. C.) 323; Taylor v. Newbern, 2 id. 141; Hill v. Com'rs of Forsythe County, 67 N. C. 367; Cincinnati v. Walker, 1 Cin. (Ohio) 121; Walker v. Cincinnati, 21 Ohio St. 14; Cincinnati, &c. R. R. Co. v. Clinton County, 1 Ohio St. 77; Steubenville, &c. R. R. Co. v. North Township, id. 105; Thompson v. Kelley, 2 Ohio St. 647; State v. Perrysburg, 14 id. 472; Com'rs of Knox County v. Nichols, id. 260; State v. Union, 8 id. 394; State v. Goshen, 14 id. 569; Brown v. County Com'rs, 21 Penn. St. 37; Sharpless v. Philadelphia, id. 147; Moers v. Reading, ib. 188; Com. v. Allegheny County, 32 id. 218; Com. v. Pittsburgh, 41 id. 278; Com. v. Pittsburgh, 34 id. 496; Com. v. Perkins, 43 id. 400; Com. v. McWilliams, 11 id. 61; Nichols v. Nashville, 9 Humph. (Tenn.) 252; Louisville & Nashville R. R. Co. v. County Court, 1 Sneed (Tenn.), 637; San Antonio v. Jones, 28 Tex. 19; San Antonio v. Lane, 32 id. 405; Lee County v. Rogers, 7 Wall. (U. S.) 181; Beloit v. Morgan, id. 619; City of Kenosha v. Lamson, 9 id. 477; Railroad Co. v. County of Otoe, 16 id. 667; Olcott v. Supervisors, id. 678; Gilman v. Sheboygan, 2 Black. 510; Woods v. Lawrence County, 1 id. 380; Gibbons v. Mobile & Great Northern R. R. Co., 36 id. 410; Mississippi, &c. R. R. Co. v. Camden, 23 Ark. 300; English v. Chicot County, 26 id. 454; Napa Valley R. R. Co. v. Napa County, 30 Cal. 435; Stockton and Visalia R. R. Co. v. Stockton, 41 id. 147; People v. Coon, 25 id. 635; Robinson v. Bidwell, 22 id. 379; Beardsley v. Smith, 16 Conn. 368; Bridgeport v. Housatonic R. R. Co., 15 id. 475; Cotton v. Leon County, 6 Fla. 610; Powers v. Inferior Court of Dougherty County, 23 Ga. 65; Winn v. Macon, 21 Ga. 275; Prettyman v. Tazewell County, 19 Ill. 406; Robertson v. Rockford, 21 Ill. 451; Butler v. Dunham, 27 Ill. 474; Supervisors of Schuyler County v. People, 25 id. 181; Dunnovan v. Green, 57 id. 63; Madison County v. People *ex rel.*, 58 id. 456; Board of Bartholomew County v. Bright, 18 Ind. 93; Evansville, &c. R. R. Co. v. Evansville, 15 id. 395; City of Aurora v. West, 22 id. 88; same v. same, 9 id. 74; Thompson v. City of Peru, 29 id. 305; La Fayette, Muncie, & Bloomington R. R. Co. v. Geiger, 34 id. 185; Com'rs of Crawford County v. Louisville, &c. R. R. Co., 39 id. 192; John v. Cincinnati, Richmond and Ft. Wayne R. R. Co., 35 id. 539; Dubuque County v. Dubuque & Pacific R. R. Co., 4 G. Greene (Iowa), 1; State v. Bissell, id. 328; Clapp v. Cedar County, 5 Iowa, 15; McMillen v. Boyles, 6 id. 304; McMillen v. Lee County, 3 id. 311; McMillen v. County Judge, 6 id. 391; Games v. Robb, 8 id. 193; Stewart v.

<sup>1</sup> Cooley on Const. Lim., pp. 261-266; Dillon on Municipal Corporations, §§ 104, 105.

courts, and among all the States in which this question has been presented, the courts of the State of Michigan<sup>1</sup> stand alone in denying that the legislature possesses this power. In New York<sup>2</sup> the Supreme Court took the position that the legislature could not authorize a municipal corporation to issue bonds and devote the proceeds to aid private corporations; but this doctrine was overruled in the United States Supreme Court,<sup>3</sup> and the Court of Appeals,<sup>4</sup> while admitting that the legislature might confer authority upon such corporations to aid in the construction of railroads, yet held that it did not possess the power to *compel* them to do so, and refused to issue a writ of mandamus to that end. In Iowa,<sup>5</sup> up to 1858 it was held that such acts were constitutional, but from that time up to 1869<sup>6</sup> they were held to be unconstitutional, when the court seems to have undergone a radical change, and from that time to the present the constitutionality of such measures has been sustained.<sup>7</sup>

Supervisors, 30 id. 9; McGregor, &c. R. R. Co. v. Birdsall, id. 255; City of Atchison v. Butcher, 3 Kan. 104; Com'rs of Leavenworth County v. Miller, 7 id. 479; Talbot v. Dent, 9 B. Mon. (Ky.) 526; Slack v. Maysville & Lexington R. R. Co., 13 id. 1; Hallenback v. Hahn, 2 Neb. 377; Reineman v. Covington, &c. R. R. Co., 7 id. 310; Bank of Rome v. Rome, 18 N. Y. 38; Starin v. Genoa, 23 id. 439; Duaneburgh v. Jenkins, 66 N. Y. 129; Clay v. Hawkins Co., 5 Lea (Tenn.), 137; Winston v. Tenn., &c. R. R. Co., 57 Tenn. 60; Landerdale Co. v. Ferguson, 7 Lea (Tenn.), 153; Williams v. Duck River Valley R. R. Co., 9 Baxt. (Tenn.) 488; Supervisors v. Wisconsin, &c. R. R. Co., 121 Mass. 460; Oleson v. Green Bay, &c. R. R. Co., 36 Wis. 383; Phillips v. Albany, 28 Wis. 340; Lawson v. Milwaukee, &c. R. R. Co., 36 Wis. 383; Long v. New London, 9 Biss. (U. S. C. C.) 539; New Orleans, &c. R. R. Co. v. McDonald, 53 Miss. 240; State v. Clark, 23 Minn. 423; Leavenworth, &c. R. R. Co. v. Douglass Co., 18 Kan. 169; Morris v. Morris Co., 7 id. 57C, State v. Nemaha Co., 7 id. 542; Barnes v. Atchison, 2 id. 454; Lewis v. Barbour Co., 105 U. S. 739; Clay Co. v. Society for Savings, 104 U. S. 479.

<sup>1</sup> People v. Salem, 20 Mich. 452; Thomas v. Port Hudson, 27 id. 320; Bay City v. State Treasurer, 23 id. 499. See,

denying that laws authorizing municipal aid to railroads are in conflict with the constitution of Michigan, and denying the authority of these cases, Talcott v. Pine Grove, 1 Flip. (U. S. C. C.) 120.

<sup>2</sup> Sweet v. Hurlburt, 51 Barb. (N. Y.) 312; overruled in Queensburg v. Culver, 19 Wall. (U. S.) 82. See also Clarke v. Rochester, 28 N. Y. 605; Grant v. Courter, 24 Barb. (N. Y.) 232; Benson v. Albany, 24 id. 248; People v. Henshaw, 61 id. 409; and *Ex parte* Taxpayers of Kingston, 40 How. Pr. (N. Y.) 444, where it was held that the legislature may authorize municipal corporations to subscribe for the stock of a railroad corporation, and submit the expediency of borrowing money for that purpose to a vote of the people of the city or town.

<sup>3</sup> Queensburg v. Culver, 19 Wall. (U. S.) 82.

<sup>4</sup> People v. Batchellor, 53 N. Y. 128. But see Napa Valley R. R. Co. v. Napa Co., 30 Cal. 435, where it was held that the legislature may compel a county to subscribe and to issue its bonds for stock.

<sup>5</sup> Dubuque County v. Dubuque, 4 Greene (Iowa), 1; State v. Bissell, 4 id. 328; Clapp v. Cedar Co., 5 Iowa, 15; Millen v. Lee Co., 6 id. 391.

<sup>6</sup> Stokes v. Scott, 10 Iowa, 166; State v. Wapello, 13 id. 388; Myers v. Johnson, 14 Iowa, 47.

<sup>7</sup> Stewart v. Polk Co., 30 Iowa, 9;

It is held in New York,<sup>1</sup> and in Illinois<sup>2</sup> that, while the legislature may authorize these corporations to issue bonds, etc., to aid in the construction of railroads, it cannot compel them to do so. But in California<sup>3</sup> a different doctrine is held, and the legislature is held to have authority to compel a municipal corporation to subscribe for stock of a railroad company *volens volens*.

The circumstance that there is a constitutional provision restricting the State from incurring indebtedness does not preclude the legislature from authorizing a municipal corporation from doing so, because the restriction relates to the State as such, and not to its subdivisions.<sup>4</sup> Nor does the fact that the State itself is prohibited from subscribing for the stock of a railroad prevent the legislature from authorizing a municipal corporation to do so.<sup>5</sup>

**SEC. 101. Power must be exercised in Conformity with the enabling Act: Estoppel.**—Inasmuch as municipal corporations have no power, as such, to subscribe for stock in a railroad corporation, or pledge their credit for the construction of a railroad by a private corporation, it follows as a matter of course that in order to make a valid exercise of the power, the preliminary conditions imposed by the act conferring the authority must be substantially performed, in accordance with the letter and spirit of the statute.<sup>6</sup> Thus, if either the constitution or the act conferring the authority provides that such subscription may be made or aid given, if *two-thirds* of the voters of the town, city, or county so vote at a meeting called for that purpose, it must clearly appear not only that such a majority vote was obtained, but also that it was obtained at a meeting of the voters duly called, as specified in the act, or if the mode of calling and conducting the meeting is not therein specified, according to the law existing for the calling and conducting of such meetings in the municipality in question.<sup>7</sup>

If the statute authorizes a subscription to stock if the town so votes at "*a regular town meeting*," a vote to that effect at a *special*

McGregor v. Birdsall, 32 id. 149; Jordan v. Hayne, 36 id. 9; Muscatine, &c. R. R. Co. v. Horton, 38 id. 33; Wapello v. B. & M. R. R. Co., 44 id. 585.

<sup>1</sup> People v. Batchellor, 53 N. Y. 128.

<sup>2</sup> Cairo, &c. R. R. Co. v. Sparta, 77 Ill. 505.

<sup>3</sup> Napa Valley R. R. Co. v. Napa County, 30 Cal. 435.

<sup>4</sup> Cass v. Dillon, 2 Ohio St. 607;

Thompson v. Kelly, 2 id. 647; Prettyman v. Supervisors, 19 Ill. 406; Police Jury v. McDonough, 8 La. An. 341; State v. Madison, 7 Wis. 688; Slack v. Maysville, &c. R. R. Co., 13 B. Mon. (Ky.) 9.

<sup>5</sup> Clarke v. Janesville, 10 Wis. 136; Bushnell v. Beloit, 10 id. 195; Robertson v. Rockford, 21 Ill. 451.

<sup>6</sup> People v. Smith, 45 N. Y. 772.

<sup>7</sup> People v. Dutcher, 56 Ill. 144.

meeting called for that purpose is held to be insufficient to confer authority upon the town to make the subscription.<sup>1</sup> But this doctrine is at least questionable, and places a forced construction upon the word "*regular*." Giving to that word its ordinary signification any meeting of the inhabitants of the town, *which is called and held according to the law for the calling and holding of such meetings*, would be a "*regular town meeting*" within the true import of the word, unless the word has by usage throughout the State acquired a signification entirely different from that which it ordinarily has, and from the whole statute it is evident that the legislature intended to give to the word its *extraordinary* rather than its *ordinary* sense, or unless the legislature itself, in the statutes relating to town meetings, has given a different construction to the word by providing that its "*regular meetings*" shall be held at a certain time.

In New York it is held that in order to enable a municipal corporation to issue bonds in aid of a railroad, there must be a strict conformity with the letter and spirit of the law,<sup>2</sup> and that every step required by the statute must be shown to have been taken, and that the courts will not undertake to say that any of the requirements are immaterial.<sup>3</sup>

To confer jurisdiction, the petition must show that it is signed by a majority of the taxpayers, "exclusive of those taxed for dogs or highway tax only;" and such want of jurisdiction may be set up as a defence against a *bonâ fide* purchaser of the bonds.<sup>4</sup> The taxpayers may, in giving their consent, impose conditions, a compliance with which will be essential to the validity of the subscription.<sup>5</sup> A town is not bound by the decision of its assessor that a majority of the taxpayers have signed the consent.<sup>6</sup> A village assessment-roll, made before the assessors have taken the oath of office, cannot be made the basis of issuing its bonds.<sup>7</sup> Commissioners appointed under the

<sup>1</sup> *Pana v. Lippincott*, 2 Brad. (Ill.) 466.

<sup>2</sup> *People v. Smith*, 45 N. Y. 772; *People v. Hurlburt*, 46 id. 110.

<sup>3</sup> *Merritt v. Portchester*, 71 N. Y. 309. In this case the statute required the commissioners of estimate, &c. to take an oath to "faithfully and fully discharge the duties," and in the case in question they having taken an oath to perform the duties "to the best of their abilities," it was held that the assessment was void. In *Angel v. Hume*, 17 Hun

(N. Y.), 374, the verification of the petition only covered a part of the allegations contained therein, and it was held fatally defective. See also *Culver v. Fort Edward*, 8 Hun (N. Y.), 340.

<sup>4</sup> *Wilson v. Caneadea*, 15 Hun (N. Y.), 218. And see *Angel v. Hume*, 17 id. 374.

<sup>5</sup> *People v. Hutton*, 18 Hun (N. Y.), 116.

<sup>6</sup> *People v. Barrett*, 18 Hun (N. Y.), 206.

<sup>7</sup> *People v. Suffern*, 68 N. Y. 321.

statute have no power to bind the town by an act not done in strict compliance with the authority conferred by the vote of the taxable inhabitants.<sup>1</sup>

When the law requires that the meeting shall be called by a particular officer, an election called by the wrong authority is void and confers no authority to make the subscription;<sup>2</sup> so if the law requires that a notice of the meeting shall be posted a certain number of days before it is held, if a notice is posted *less* than that number of days, the action of the meeting will be invalid, and will not authorize either a making of the subscription or the issue of the bonds.<sup>3</sup>

Where it is admitted by the pleadings that there was not a majority of the legal votes cast at the election in favor of subscription, the board of supervisors can neither make a valid subscription, nor make statements or pass resolutions to bind their county.<sup>4</sup> And a proposition to vote bonds, modified one week before the election in such a manner as to become a new proposition, cannot be legally voted upon at that election, as there is not remaining sufficient time before the election in which to give the notice required by law.<sup>5</sup> In the absence of any prohibition in the statutes against more than one submission to the electors of the question of making a subscription, a second vote is not unlawful.<sup>6</sup>

An article in a warrant for a town meeting called to vote upon the question of municipal aid, if it gives notice with reasonable certainty of the subject matters to be acted upon is sufficient. Thus, an article in a warrant for a town meeting "to see if the town will loan its credit to aid in the construction" of a certain railroad was held sufficient.<sup>7</sup> The bonds of a town are not invalidated by a mere irregularity in calling the meeting, and a court of equity will not annul bonds issued by a town, upon that ground, but will leave the parties to their legal rights.<sup>8</sup> A bond authorized by statute must comply with the terms of the act,<sup>9</sup> and if authority is given to issue bonds to run not exceeding *ten* years, there is no authority to issue them payable in twenty years.<sup>10</sup>

<sup>1</sup> *Horton v. Thompson*, 71 N. Y. 513.

<sup>2</sup> *County of Richland v. People*, 3 Brad. (Ill.) 210. See also *Bowling Green, &c. R. R. Co. v. Warren County*, 10 Bush (Ky.), 711

<sup>3</sup> *Harding v. Rockford, &c. R. R. Co.*, 65 Ill. 90.

<sup>4</sup> *People v. Logan County*, 63 Ill. 374.

<sup>5</sup> *Packard v. Jefferson County*, 2 Col. 338.

<sup>6</sup> *Supervisors v. Galbraith*, 99 U. S. 214.

<sup>7</sup> *Belfast, &c. R. R. Co. v. Brooks*, 60 Me. 568.

<sup>8</sup> *Sauerhering v. Iron Ridge, &c. R. R. Co.*, 25 Wis. 447.

<sup>9</sup> *Wheatland v. Taylor*, 29 Hun (N. Y.), 70.

<sup>10</sup> *Cairo, &c. R. R. Co. v. Sparta*, 17 Ill. 106. See *People v. Harp*, 67 id. 62.

The question whether the requisite steps have been taken, to confer upon a municipal corporation authority to issue its bonds in aid of a railroad corporation, must necessarily depend so largely upon the provisions of the statute in each State that it is impossible to lay down any general rule which will control in all cases; but the statute in each case must be looked to, and its essential provisions be complied with.

If the statute provides that the vote shall be taken by ballot, neither a vote by a division of the house nor a vote *viva voce* would be sufficient, if seasonably questioned. But it seems that where the records of the town show that the vote to give the aid was adopted by the requisite majority, but does not show whether a ballot was taken or not, the railroad corporation has a right to presume that it was taken as required by law, and having acted upon it, the town is estopped from setting up the fact that the vote was not taken by ballot, in defence to an application for a *mandamus* to compel the issue of the bonds. Thus, in a Connecticut case,<sup>1</sup> the town of

<sup>1</sup> *New Haven, &c. R. R. Co. v. Chatham*, 42 Conn. 455. These informalities in giving notice or in conducting the meeting will not invalidate the bonds issued in pursuance of a vote taken at the meeting, if no objection is made upon that ground until the bonds become due. *Johnson v. Stark*, 24 Ill. 75; *Clarke v. Hancock County*, 27 id. 205. The charter of a railroad company in Illinois allowed counties, &c., to subscribe to the stock of the corporation and issue bonds in payment, if a majority of voters at an election called by the county court should favor the subscription. The voters of a county, which had adopted a township organization, voted in favor of subscribing to the stock at an election called by its board of supervisors. A subsequent statute, relating to the company, provided that "all elections held for the purpose of voting said stock, and the manner in which said stock was voted, are hereby legalized in all respects, and the stock to be subscribed in the manner the same was voted." On the authority of this act and the election, the board of supervisors issued bonds of the county. At this time a county court existed in the county. Before the bonds fell due, a statute was passed authorizing municipal corpora-

tions, &c., to fund their bonds, which, in brief, declared that in cases where a county, &c., had issued bonds for subscription to railroad companies, &c., "which are now binding or subsisting legal obligations," and "which are properly authorized by law," the county, &c., might, on surrender of such bonds, issue new ones, with the provision that the issue should first be authorized by a vote of the majority of the legal voters of the county, &c. Conformably to this provision, and pursuant to such a vote, the board of supervisors issued, in exchange for the old bonds, funding bonds, having a longer period to run, and bearing a lower rate of interest. In a suit against the county by a holder of funding bonds, which he had received in exchange for surrendered bonds, it was held that the vote of the people at the last election recognized the original bonds as binding and subsisting obligations, and that the county was, therefore, estopped from setting up that they were invalid because voted for at an election called by the board of supervisors instead of by the county court, and that where, at an election held according to law, the people of a county authorized their proper representatives to treat certain outstanding county obligations as



Chatham, for the purpose of aiding in the completion of a railroad that was in the course of construction through the town, and which was in an embarrassed condition, passed a vote, under authority of the legislature, to guarantee not exceeding \$40,000 of certain bonds which the railroad company was authorized to issue, such guarantee to be made after the road was completed. The resolution authorizing this action of the town provided that the vote should be by ballot, and the warning of the town meeting, which was recorded upon the records of the town, stated that the vote would be so taken, that ballot-boxes would be open for the purpose, and that those in favor of the proposition would deposit ballots with "Yes" upon them, and those opposed, ballots with "No" upon them. The record of the meeting by the town clerk was, that "the resolution was adopted, — 'Yes,' 178; 'No,' 86." The vote was in fact taken by division of the house, and not by ballot, but neither the officers of the town nor any person in its behalf ever claimed or gave notice that it was not taken by ballot, until more than three years after, and until long after the railroad company had, in good faith and with the knowledge of all the inhabitants of the town, issued the bonds which were to be guaranteed, and delivered them to contractors, who had performed work, furnished materials, and expended money in reliance upon them, the contractors taking them with an order upon the town for its guarantee of them when the work was completed. It was held that the town, as a municipal corporation, and the inhabitants of the town, were estopped from claiming that the vote was not legally taken, and from

properly authorized by law for the purpose of settling with the holders, and the settlement has been made, the validity of the obligations can no longer be questioned. *Jasper County v. Ballou*, 103 U. S. 745. In *Gause v. Clarksville*, 1 McCrary (U. S. C. C.), 78, it was held that where a city without power to make negotiable obligations, sells its void bonds, and, receiving the money therefor, applies it to its legitimate corporate uses, an action will lie to recover the money so received and applied, and such action may be brought by the *bond fide* holder of such bonds as assignee of the original demand; and that where a bond is made by a city for two considerations, as to one of which it has power to make a bond, but as to the other has none, such bond is wholly void. The holder cannot recover on the

bond as such. His remedy is an action for money had and received. A city ordinance, authorizing a subscription to stock of a road company and issue of bonds to pay the same, recited that the authority prescribed by the law as a prerequisite of such subscription had been given by an election held for the purpose. In a suit upon such bonds, it was held that the city was estopped by such recital to show that the voters at such election were not duly sworn, and the election therefore void. Also, that where the holder of a valid bond presents it to the maker when due, and receives in payment a *renewal* bond, which for any reason is void, the old bond, though surrendered for cancellation, is not extinguished, but recovery may be had on it as if the new bond had not been given.

availing itself of a correction of the record by the town clerk, afterwards made under an order of the Superior Court, upon the application of one of the taxpayers of the town, showing that the vote was taken by a division of the house and not by ballot.<sup>1</sup>

It appeared that when the vote was taken the treasurer and managing director of the railroad company was present, and saw how it was done, but that he was not acting officially, and that his knowledge was not conveyed to any of the other directors of the company,

<sup>1</sup> See *Amey v. Alleghany*, 24 How. (U. S.) 364; *Elmendorf v. Ewen*, 2 Leg. Obs. (N. Y.) 85; *Striker v. Kelly*, 7 Hill N. Y.), 9; *Elmendorf v. New York*, 25 Wend. (N. Y.) 693, where a failure to comply strictly with the requirements of the statute was held not to invalidate an ordinance. See *Munson v. Lyons*, 12 Blatchf. (U. S. C. C.) 539; *First National Bank of Oswego v. Walcott*, 19 id. 370; and *Whiting v. Potter*, 2 Fed. Rep. 517, where the doctrine of estoppel was applied against such corporations, and they were held estopped from setting up formal or other defects in the issue of the bonds. See also, to the same effect, *Lamb v. B. C. R. &c. R. R. Co.*, 39 Iowa, 333; *B. C. R., &c. R. R. Co. v. Stewart*, 39 id. 267; *Leavenworth, &c. R. R. Co. v. Douglass Co.*, 18 Kan. 169. But see *People v. Santa Anna*, 67 Ill. 57, to the contrary; also *Sinnett v. Moles*, 38 Iowa, 35, where it was held that the town was not estopped when the vote was procured by fraud. The doctrine of estoppel as applied to municipal corporations is fully recognized in the United States Supreme Court, and there can be no question as to its justice, whatever may be said as to its soundness. Thus a town in Wisconsin, being thereto authorized by law, subscribed for stock in a railroad company, and issued its bonds in payment therefor, each reciting that it "shall be valid only when it is thereon duly certified that the conditions upon which it was voted, issued, and deposited by said town have been performed." Suit was brought on the bonds by a party who, in good faith, purchased them before they matured, and it was held that the certificate on the bonds, signed by the president of the company and the chairman of the town board of supervisors,

and duly sworn to, to the effect that iron had been laid on the road between the designated points, and that cars had been run over the same daily for two weeks prior to the date of the certificate, that being the condition upon which such bonds were issued and deposited in trust, was in proper form, estopping the town from denying their validity, and placing them in condition to be put on the market as commercial paper. *Menasha v. Hazard*, 102 U. S. 81. See also *Hunter v. Kernochan*, 103 id. 562, where a town was held to be estopped, as against a *bond fide* holder, from denying the validity of the bonds, where the records show that the bonds were directed to be issued and delivered to a corporation formed by the consolidation of the corporation to which it was voted to issue them with another corporation. In *Tipton County v. Rogers Locomotive Works*, 103 U. S. 523, a county having issued its bonds under lawful authority in payment of its subscription to the stock of a railroad company, the railroad company entered into an arrangement to consolidate with another railroad company, provided the county court of such county would, on an extension of time being granted, levy and collect a tax sufficient to pay the bonds. The county court accepted the proposition and gave the assurance, and the consolidation took place. It was held that the county was estopped from denying the validity of the bonds, in the hands of a *bond fide* holder, to whom they were transferred for value by the consolidated company. See also *Harter v. Kernochan*, 103 U. S. 562, where the same rule was adopted under a quite similar state of facts as to township bonds.

and it was held that the railroad company was not affected by his knowledge. The town had previously subscribed for a large amount of the stock of the company, and issued its bonds in payment, under what it supposed sufficient authority. The town now claimed that its acts were unauthorized, and that the railroad company was indebted to it for the money received. It was held that, in view of the object for which the town had undertaken to guarantee the bonds, and of the use that had been made of them for the promotion of that object, and of the equitable rights of contractors and material-men, the town could not set off this claim upon the company against the claim of the company for the guaranteeing of the bonds. As the contractors received the bonds, not as payment of their claims, but as a means of procuring payment, the railroad company on the one hand still retained an interest in them, which enabled it to maintain a petition for a mandamus to compel the town to make the guarantees, while on the other the equitable interest of those who had performed work and furnished material in reliance upon the bonds, was to be fully recognized by the court. It was also held that although the vote of the town directed the selectmen to guarantee in behalf of the town an amount of bonds "not to exceed \$40,000," yet the town had by the whole transaction and by its arrangement with other towns interested in the completion of the road, so far committed itself to that full amount, that no discretion was left to the selectmen to fix upon any less amount.

In a Wisconsin case<sup>1</sup> the statute provided that notice of the meeting should be "posted by the town clerk or supervisors." It was held that this did not require that they should do this in person, but that it was sufficient if they procured others to post the notices.<sup>2</sup> Where the statute required that there should be an application for the calling of a meeting, signed by *twenty* legal voters and taxpayers, and that notice of the meeting should be posted at least twenty days, it was held that this condition must be complied with, and that an application by only *twelve* legal voters and taxpayers, and a notice posted only *ten* days before the meeting, were not sufficient; and bonds issued in pursuance of a vote at such a meeting were held invalid, although there was a statement upon the face of the bonds that the law had been complied with in all respects.<sup>3</sup>

<sup>1</sup> Phillips v. Albany, 28 Wis. 340.

<sup>2</sup> Williams v. Roberts, 88 Ill. 11; People v. Oldtown, 88 id. 202. In such a

<sup>3</sup> See also Lawson v. Milwaukee, &c. R. R. Co., 30 Wis. 597. case there is a total lack of authority, and

It will be presumed that the bonds of a municipal corporation issued in apparent compliance with the law authorizing the issue, have been actually issued in conformity with the law, — especially in the hands of a *bond fide* holder. He is held chargeable with a knowledge of the law authorizing the bonds to be issued; but in the absence of actual notice, it is not held to be his duty to inquire into the fulfilment of all the formal prerequisites to their issue. If the bond is regular on its face, he has a right to act upon the supposition that all the formalities have been observed in the time, form, and substance, as required by law.<sup>1</sup> Mere informalities in the notice for, or in the conduct of a meeting called to vote upon the question

no more power to issue bonds exists under such a vote than existed before it was passed. *Wells v. Pontiac County*, 102 U. S. 625. But such bonds are *prima facie* valid, and the burden is upon the town to establish its want of authority to issue them. *Lincoln v. Cambria Iron Co.*, 103 U. S. 412. If a municipal corporation *before its own charter becomes operative*, votes to subscribe for stock of a railroad company, the vote is a nullity, and cannot be ratified by its officers after the charter goes into effect. *Clark v. Janesville*, 13 Wis. 414; *Rochester v. Alfred*, 13 id. 432; *Berliner v. Waterloo*, 14 Wis. 378; *Clarke v. Zanesville*, 10 id. 136; *Winchester, &c. Co. v. Clarke*, 3 Met. (Ky.) 140.

<sup>1</sup> *Flagg v. Palmyra*, 33 Mo. 440; *Quincy v. Warfield*, 25 Ill. 317; *Society for Savings v. New London*, 29 Conn. 124; *Myer v. Muscatine*, 1 Wall. (U. S.) 385; *Sherman County v. Simons*, 109 U. S. 735. The legislature may make the negotiability of municipal bonds depend upon their delivery by the treasurer of the State, and a purchaser of bonds, purporting upon their face to have been issued under the provisions of a statute containing such a condition, is not a *bond fide* purchaser without notice, where the bonds were fraudulently issued, without being thus delivered. *Lewis v. Barbour County Com'rs*, 1 McCrary (U. S. C. C.), 458. But it has been held by the New York Supreme Court that one who in good faith has purchased bonds issued by a town in aid of a railroad, after the affidavit of the assessor

or clerk required by the statute relating to the issue of bonds that the consent of a majority of the taxpayers had been obtained, has been duly made and filed, and while the proceedings remained unreversed, is protected thereby; the authority of the town commissioners to issue the bonds cannot be impeached by showing that such consent had not in fact been signed by the requisite number of taxpayers. *Cagwin v. Hancock*, 22 Hun (N. Y.), 291. But see *Cagwin v. Hancock*, 84 N. Y. 532, where this doctrine was reversed by the Court of Appeals upon the ground that there not being the requisite number of tax payers, there was a total want of authority to issue the bonds, and consequently that the principles of estoppel did not apply, and this would seem to be sound doctrine, and is sustained by the authorities. In *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611, it was held that the bonds which the city of Wetumpka had authority to issue in payment of its subscription to the stock of the Central Plank Road Co., are void in the hands of any holder, if not issued, as provided in the act authorizing their issue, with the entire concurrence of the board of mayor and aldermen, when there was no vacancy in the board, such concurrence being made manifest by an entry on the minutes of the board, signed by each member thereof; and that an owner of a bond so issued who has recovered a judgment thereon cannot maintain a bill to enforce the trust created by the statute for the purpose of satisfying his judgment.

of subscribing for stock,<sup>1</sup> or in the form of the bonds, will not invalidate them. Thus, where bonds issued under a statute which directs that the bonds shall be negotiable and transferable "by the order of the president and directors of the company," were made payable to the company, "its assignee, or bearer," they were held valid.<sup>2</sup>

So where bonds were issued bearing interest at *twelve* per cent, when the statute authorized the payment of only *eight* per cent, it was held that the bonds were good for the principal, and interest at *eight* per cent.<sup>3</sup> This is upon the principle that all persons are presumed to know what the provisions of a public statute are, and in contracting with a corporation or individual in reference to matters which are regulated by statute, they intend to act in accordance therewith, and not in violation of it.

But bonds of a municipal corporation issued *ultra vires* are void even in the hands of an innocent purchaser without actual notice of the want of power to issue them. He must be presumed to have examined the charter, ordinances, and other avenues to information thereon. The general power of a municipal corporation to issue bonds to pay debts or borrow money for municipal purposes does not include power to issue bonds as a mere donation, unless such authority is expressly given.<sup>4</sup> So where bonds of a municipal corporation are issued *without any power or authority in law*, — as, under what purported to be a law, but which was not passed in the constitutional mode, — they are absolutely void, no matter in whose hands they may be; but if the legal power or authority to issue them existed, but was defectively or irregularly exercised, they are only voidable, and an innocent holder may collect them. Where they are void, no subsequent act or recognition of their validity by the municipal authorities can estop the taxpayers from denying their legality.<sup>5</sup>

Nor, in the absence of express statutory authority, have they the right to make bonds issued by them payable at any other place than their treasury; but, if they are made payable at some other

<sup>1</sup> Johnson v. Stark, 24 Ill. 75; Clarke v. Hancock County, 27 id. 305; Winchester & Co. v. Clark, 3 Met. (Ky.) 146.

<sup>2</sup> Maddox v. Graham, 3 Met. (Ky.) 56.

<sup>3</sup> Quincy v. Warfield, 25 Ill. 317. In Gould v. Sterling, 23 N. Y. 456, it was held that a misstatement upon the face of the bonds of the statute under which they

were issued is not necessarily material. And in Hogg v. Palmyra, 33 Mo. 440, the fact that bonds were antedated was held not to affect their validity. See also Louisiana v. Wood, 102 U. S. 294.

<sup>4</sup> Bissell v. Kanakee, 64 Ill. 249.

<sup>5</sup> Ryan v. Lynch, 68 Ill. 160.

place, this will not invalidate the bonds, the provision to pay at some other place being void.<sup>1</sup> A city issued bonds duly authorized by a majority of its voters, under its charter, reciting that they were issued in accordance with certain city ordinances, the titles of which, being quoted alone in the bonds, characterized the ordinances as providing for a loan for municipal purposes. In a suit upon the bonds by an innocent purchaser for value it was held that the city was estopped to set up that the ordinances appropriated the money to other purposes, and that the bonds were therefore void.<sup>2</sup> So where bonds in aid of a railroad company were duly issued by a town, signed by A. as chairman of the board of supervisors, and by B. as town clerk, and delivered to the company by A., — in a suit on the coupons, which contained the lithographed signatures of both A. and B., the town pleaded that, though the bonds bore date of June 1, they were not in fact signed by B. until June 13, when he was no longer town clerk, his resignation having been accepted, and his successor elected on June 17. It was held that the town was estopped from proving that B. in fact signed the bonds after he went out of office; and that, in the absence of anything to the contrary, it must be assumed for all the purposes of the case that the bonds were delivered to the company by A., with the assent of the then town clerk, and that they were therefore issued by the proper officers of the town.<sup>3</sup>

Under a statute of Kansas, a city passed an ordinance for grading, paving, guttering, and macadamizing one of its streets within prescribed limits, and for paying the cost of the work by the issue of special improvement bonds of the city, which were accordingly issued in due form. The ordinance also provided that the bonds should be paid, principal and interest, solely from special assessments, to be made upon and collected from the lots and pieces of ground upon the street for the distance improved. In a suit by a *bond fide* holder of the bonds, the city sought to avoid payment on the ground that the bonds stated on their face that they were issued in pursuance of such ordinance, and that therefore they were to be paid only from such special assessments; but the court held that, as between the plaintiff and the city, this did not control its general liability on the bonds, and that it was bound to impose a tax upon all the taxable

<sup>1</sup> *Sherlock v. Winnetka*, 68 Ill. 530.

<sup>3</sup> *Weyauwega v. Ayling*, 99 U. S.

<sup>2</sup> *Hackett v. Ottawa*, 99 U. S. 86.

property within its limits, in satisfaction of the judgment obtained thereon.<sup>1</sup>

A provision in an act authorizing a county to issue bonds in payment of subscriptions to the stock of a railroad company recited that the same should be made payable to the president and directors of the company and their successors and assigns; the bonds issued were, however, made payable to the company or bearer, and it was held that this did not affect the validity of the bonds, as the requirement was only directory; and the act having designated no place of payment of the bonds, it was held competent for the county to make such designation.<sup>2</sup>

Where the authorities of a town, being duly empowered, subscribed in its behalf for stock in a railroad company, and issued its coupon bonds in payment therefor, the town, when sued by a *bond fide* purchaser for value of the coupons before maturity, cannot set up as a defence that the company disregarded its promise to construct the road, or that the town officers delivered the bonds in violation of special conditions, not required by statute, and of which he had no knowledge or notice.<sup>3</sup> So where bonds of a township in Kansas, payable to A., a railroad company, or bearer, were duly executed by the township trustee and township clerk, acting in their official capacity as its legal representatives. They recited that they were issued pursuant to an order of the proper officers of the township, made by authority of an act of the legislature therein cited, and were ordered by the qualified electors of the township, at an election duly held. An action was brought by a *bond fide* holder for value of the interest coupons attached to some of the bonds, who had no notice of any fact impairing their validity. It was held that it was not a defence to the action that at the time of voting and that of issuing the bonds, their entire amount was in excess of the proportion which by law they should bear to the taxable property of the township, or that after the vote at said election had been cast in favor of subscribing for stock in B., a railroad company, the subscription was made for stock in A., and said bonds issued in payment therefor, B. having, under a law existing at the time of said election, become merged and consolidated with A. to form a continuous line of road.<sup>4</sup>

<sup>1</sup> United States v. Fort Scott, 99 U. S. 152.

<sup>3</sup> Brooklyn v. Aetna Life Ins. Co., 99 U. S. 362.

<sup>2</sup> Calhoun County v. Galbraith, 99 U. S. 214.

<sup>4</sup> Wilson v. Salamanca, 99 U. S. 499.

A county judge in New York having, upon petition by a majority of the taxpayers of a certain town, granted an order for the issue of a certain amount of bonds, in payment for railroad stock, and appointed commissioners, under the statute, to execute and deliver the same, on *certiorari* the action of the judge was sustained by the Supreme Court; and, meanwhile, the commissioners, who had not been made parties to the proceeding, had subscribed for a certain amount of stock, and issued bonds in payment therefor. Subsequently the Court of Appeals reversed the decree of the Supreme Court, solely on the ground that the county judge had refused to allow certain of the taxpayers to withdraw their signatures to the petition, which, if permitted, would have brought the number of signers and amount of taxable property represented below the statutory limit. In a suit upon the bonds, against the town, by a *bond fide* holder, it was held that he was entitled to recover.<sup>1</sup>

An election was held in a county in Kansas upon the question of a county subscription to the capital stock of "any railroad company," then or thereafter to be organized, which should construct a railroad from a point in Missouri to a point in the county; and the result having been declared by the proper authorities to be in favor of the subscription, and so entered on their minutes, the bonds were three years afterward issued in payment of the subscription to a Missouri company which caused the road to be built. It was held that the subscription was binding, and that the county, in an action on the bonds by such a purchaser, was estopped from asserting that in fact a majority of the qualified electors had not voted in favor of the issue of the bonds.

It will thus be seen that the rule is that a *bond fide* purchaser of municipal bonds for a valuable consideration, who had no actual notice of any defence which could be set up against them, is not bound to look further than to see that there was legislative authority for their issue, and that the officers who were thereunto authorized have decided that the precedent conditions upon which it was allowed to be exercised have been fulfilled. If such authority was conferred and such a decision made, the bonds are valid obligations which he may enforce.<sup>2</sup>

**SEC. 102. Recitals in Bonds, Effect of.** — Where a municipal corporation issues bonds, and recites therein that it has complied

<sup>1</sup> Orleans v. Platt, 99 U. S. 676.

<sup>2</sup> Block v. Bourbon County, 99 U. S. 686.



with all the statute requirements in reference to their issue, such recitals are held to be conclusive as to their validity so far as such matters are concerned; and the corporation is estopped as against a *bond fide* holder from setting up its non-compliance with the statute, to defeat its liability;<sup>1</sup> even though, by permission of the statute, conditions had been imposed by the vote authorizing their issue, which have not been fulfilled, and the statute declares that in such case they shall not be binding.<sup>2</sup> In Kansas,<sup>3</sup> under the statute authorizing the issue of county bonds, and providing that until performance of the conditions on which subscriptions might be made they should be deposited with the State treasurer in escrow, and should not be negotiable until delivery by him, or that instead of the treasurer some third party might be selected as trustee, certain bonds were issued which by fraud were put in circulation without first having been delivered to the treasurer. *Each bond referred to the act, and was accompanied by a certificate of the auditor that it was regularly and legally issued.* It was held that delivery to the treasurer was not an essential prerequisite to the validity of the bonds in the hands of a *bond fide* holder, and that the certificate was conclusive. In a Mississippi case,<sup>4</sup> the effect of recitals in municipal obligations was considered, and it was held that if municipal authorities issue

<sup>1</sup> Clay County v. Society for Savings, 104 U. S. 579; Ottawa v. Portsmouth Bank, 105 U. S. 342; Dodge v. Platte County, 16 Hun (N. Y.), 285; Clarke v. Janesville, 10 Wis. 136; Wilson v. Salamanca, 99 U. S. 499; Supervisors v. Galbraith, 99 U. S. 214; Hackett v. Ottawa, 99 id. 86; Westermann v. Cape Girardeau County, 5 Dill. (U. S. C. C.) 112; County of Henry v. Nicolay, 95 U. S. 619; Jordan v. Cass County, 2 Dill. (U. S. C. C.) 245; Lewis v. Sherman County, 1 McCrary (U. S. C. C.), 377; Huidekoper v. Buchanan County, 3 Dill. (U. S. C. C.) 175; County of Warren v. Marcy, 97 U. S. 96; Pollard v. City of Pleasant Hill, 3 Dill. (U. S. C. C.) 195; Marshall v. Elgin, 3 McCrary (U. S. C. C.), 35; Milner v. Pensacola, 2 Woods (U. S. C. C.), 632; Williams v. Roberts, 88 Ill. 11; Coloma v. Eaves, 92 U. S. 484; Lane v. Embden, 72 Me. 354; Venice v. Murdock, 92 U. S. 494; Walnut v. Wade, 103 id. 683; Marcy v. Oswego, 92 id. 637; San Antonio v. Mehaffy, 96 id. 312; Menasha v. Hazard, 102 id. 81; Johnson County v.

January, 94 id. 202; Douglass County v. Bolles, 94 id. 104; Leavenworth County v. Barnes, 94 id. 70; Sherman County v. Simons, 109 U. S. 735. But *contra* see Cagwin v. Hancock, 84 N. Y. 532. A purchaser of bonds is not bound to look beyond the record of the commissioners to see whether the bonds were legally executed. State v. Fayette County, 37 Ohio St. 526; Sherman County v. Simons, 109 U. S. 735. In Hackett v. Ottawa, 99 U. S. 86, the bonds recited that they were issued in accordance with certain city ordinances, the titles of which being alone quoted in the bonds, characterized the ordinances as providing a loan for municipal purposes, and it was held that the city was thereby estopped from setting up that the ordinances appropriated the money for other purposes.

<sup>2</sup> American Ins. Co. v. Bruce, 105 U. S. 328.

<sup>3</sup> Lewis v. Barbour County, 105 U. S. 739.

<sup>4</sup> Aberdeen v. Sykes, 59 Miss. 236.

obligations stating on their face that they are circulated under the charter, which directs bonds to complete a railroad, and spread on the corporate minutes that they are put forth for this purpose, the municipality cannot defeat the rights of a *bond fide* purchaser by showing that the real object of their issuance was illegal. But a holder of such bonds who *knows* of the inherent defects in the issue of the bonds, stands in a different relation thereto, and is affected with their infirmities to such an extent that he cannot enforce their payment. And the same is true *where the recital is such as to affect the public with notice of its invalidity*.<sup>1</sup> And the same rule applies to a municipal ordinance. Thus, a city ordinance authorized a subscription to the stock of a corporation and the issue of bonds to pay the same, and recited that the authority prescribed by the law as a prerequisite to such subscription had been given by an election held for that purpose. In an action upon the bonds, it was held that the city was estopped by such recital from showing that the voters at such election were not duly sworn, and therefore that the bonds were void. Municipal corporations cannot be permitted to induce the public to take its securities by means of false or fraudulent statements, and then turn around and set up their own fraud in defence of an action upon the bonds, any more than an individual can, and the principles of estoppel are as justly applied to them as to individuals.<sup>2</sup>

Where, after a preliminary proceeding, such as a popular election, a county had lawful authority to issue its bonds, and they were

<sup>1</sup> McClure v. Oxford, 94 U. S. 429. In Bates County v. Winters, 97 U. S. 83, it was held that there can be no recovery upon bonds, even in the hands of innocent holders, where the recitals therein show the invalidity of the bonds. Harshman v. Bates County, 92 U. S. 569. In Barnes v. Lacon, 84 Ill. 461, it was held that where a municipal bond contains a recital that it is issued in payment of a subscription made in pursuance of a vote of the people at an election therein specified, and there was no law authorizing such election and subscription, the holder has notice by such recital of the illegality of the subscription. In Woodruff v. Okalona, 57 Miss. 806, the recital was in direct conflict with the provisions of the statute. Craig v. Andes, 93 N. Y. 405; Lippincott v. Pana, 92 Ill. 24; Horton v.

Thompson, 71 N. Y. 518; Angel v. Hume, 17 Hun (N. Y.), 374; Dodge v. Platte County, 82 N. Y. 218; Johnson v. Butler, 31 La. An. 770; Anthony v. Jasper County, 101 U. S. 693. In Sherman County v. Lewis, 1 McCrary (U. S. C. C.), 377, under a statute authorizing a county to borrow money to build a court-house, the county is not authorized to issue bonds for that purpose, and to put them on the market without realizing the amount for which they are issued; and where the statute authorizes the issue of bonds for specified purposes, and bonds are issued thereunder, containing recitals that they are issued for such purposes conformably to law, they are good in the hands of innocent purchasers.

<sup>2</sup> Gause v. Clarksville, 1 Fed. Rep. 153.

issued, bearing upon their face a certificate by the officer whose primary duty it was to ascertain the fact, that such proceeding had taken place, a *bond fide* holder of them for value before maturity has a right to assume that such certificate is true.

The doctrine of constructive notice arising from *lis pendens* does not apply to negotiable securities purchased before maturity. And it is immaterial whether the securities were created during the suit, or before its commencement, or whether the controversy relates to their origin or their transfer.<sup>1</sup> In the case of bonds regular on their face, in the hands of a *bond fide* holder without notice, it is no defence that the corporation that issued the bonds was not organized within the time prescribed by its charter; nor that, when the bonds were issued, a suit to restrain the issue was pending. Nor is evidence of irregularities or even fraud in their issue admissible; and where the plaintiff shows a clear right to recover, and the defendant shows no defence, it is always competent for the court to instruct the jury to find for the plaintiff.<sup>2</sup> Where municipal bonds contain a proper recital of the performance of the condition required for their lawful issue, and a suit is brought upon them by a *bond fide* holder, a plea which simply tenders an issue as to the actual performance of the condition is bad on demurrer.<sup>3</sup> Where the statute invests a certain board of municipal officers with the power of determining whether or not the requisite steps have been taken to authorize the issue of bonds, — as that a majority of legal voters has so voted, or a majority or other requisite proportion of voters or taxpayers have signed a consent to the issue of bonds, — their certificate to that effect is conclusive, and excludes all inquiry into such matters in a suit upon the bonds.<sup>4</sup> The doctrine generally held is, that where authority is given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered

<sup>1</sup> Warren County v. Marcy, 97 U. S. 96.

<sup>2</sup> Macon County v. Shores, 97 U. S. 272.

<sup>3</sup> Nauvoo v. Ritter, 97 U. S. 389.

<sup>4</sup> Grand Chute v. Winegar, 15 Wall. (U. S.) 355; Knox County v. Aspinwall, 21 How. (U. S.) 539; Munson v. Lyons, 12 Blatchf. (U. S. C. C.) 539; State v. Hancock County, 12 Ohio St. 596; Lynde v. Winnebago County, 16 Wall. (U. S.) 6;

Evansville, &c. R. R. Co. v. Evansville, 15 Ind. 395; Kenicott v. Supervisors, 16 Wall. (U. S.) 252; People v. Mitchell, 35 N. Y. 551; Bank of Rome v. Rome, 19 id. 20; Rock Creek v. Strong, 96 U. S. 271; Ballou v. Jasper County, 3 Fed. Rep. 620; Macon County v. Shores, 97 U. S. 272; Munson v. Lyons, Blatchf. (U. S. C. C.) 539; Black v. Commissioners, 99 U. S. 686.

from the enactment that the officers of the municipality were invested with power to decide whether that condition has been complied with, *their recital that it has been, made in the bonds issued by them and held by a bond fide purchaser*, is conclusive of the fact, and binding upon the municipality. The recital is itself a decision of the fact by the appointed tribunal.<sup>1</sup>

<sup>1</sup> *Coloma v. Eaves*, 92 U. S. 484. To the same general effect, *Humboldt Township v. Long*, 92 id. 642; *Davis v. Kendallville*, 5 Biss. (U. S. C. C.) 280; *Nicolay v. St. Clair Co.*, 3 Dill. (U. S. C. C.) 163; *Huidekoper v. Buchanan Co.*, 3 id. 175; *Pollard v. City of Pleasant Hill*, 3 id. 195. A county issued, in aid of a railroad company, bonds which recited on their face that they were issued to pay for a subscription made to a railroad, designated by name, and authorized by a vote of more than two-thirds of the qualified voters of a certain township. It was held that while the bonds were in the hands of *bond fide* holders, the county was estopped to deny that the subscription was made, or that two-thirds of the voters voted; and that it made no difference whether the requirement of a two-thirds vote was contained in the Constitution or a statute. *Westermann v. Cape Girardeau County*, 5 Dill. (U. S. C. C.) 112. In another case, a city, having the power to borrow money, issued bonds valid on their face, but void because they were antedated to evade a registration act. The city used the proceeds of the bonds for lawful purposes; and it was held that *bond fide* holders of the bonds could recover from the city the amount they had actually paid to it, with interest at six per cent. *Wood v. Louisiana*, 5 Dill. (U. S. C. C.) 122. A city which is authorized by statute to make subscriptions to the stock of any companies which may be organized to construct roads leading from it to any other point in the State, may issue bonds in payment of stock subscribed by it; and, upon these bonds falling due, may renew them by other bonds. A city which has, by its charter, express powers to erect and repair wharves, and to open and improve streets, has not also the incidental power to raise funds for these purposes by the issue and sale of its negotiable bonds.

*Gause v. Clarksville*, 5 Dill. (U. S. C. C.) 165. Where a county court ordered the issue of coupon bonds on account of a railroad subscription, payable at thirty years with semi-annual interest, just as the law required, but provided in addition that the whole should be paid in six annual instalments, and the bonds were issued and recognized as valid for sixteen years, — it was held that the bonds were not void in the hands of innocent holders merely because the additional provision in the order of the court was not incorporated in them. *State v. Anderson County*, 8 Baxter (Tenn.), 249. Where a county was indebted by its subscription to a railroad company, and the county court ordered the county bonds which were uncalled for to be burned, it was held that the court might subsequently reissue the bonds at the request of the company. *Matthews v. Blount County*, 3 Lea (Tenn.), 120. A township bond which recites that "it is to be converted and exchanged for bonds of the county of S. whenever the injunction, now covering the subscription of four hundred thousand dollars made by the county court of said county, . . . shall be finally dissolved, and bonds issued under said order," is not negotiable; and where the consideration for it has failed, no action will lie upon it. *Merriwether v. Saline County*, 5 Dill. (U. S. C. C.) 265. Inasmuch as a municipality may issue its bonds or evidence of indebtedness for a debt lawfully contracted in the proper performance of its municipal duties, bonds purporting to be bonds of the city of Pittsburgh, signed by the mayor and comptroller, countersigned by the Penn Avenue Committee, having the corporate seal affixed, and for whose payment the faith and credit of the city were pledged, if issued to the holder for a valuable consideration, are valid against the city; and the holders are not

Where county bonds, sued by a *bond fide* purchaser for value before maturity, contained recitals that they were issued by the county in pursuance of a subscription of the capital stock of a railroad company, made by the board of supervisors of the county, in conformity to the provisions of the statute, and the purchaser was thus assured that the subscription was properly and legally made, it was held that it would be tolerating a fraud to permit the county, when called upon for payment, to set up that it was not made until after the authority had expired.<sup>1</sup> So where by statute authority was given to certain officers of a town to issue bonds on their obtaining the written assent of two-thirds of the resident taxpayers of the town, and filing the same in the county clerk's office, together with their affidavit that those signing the assent comprise two-thirds of the resident taxpayers, the officers are empowered to decide whether the condition precedent to the exercise of their authority has been complied with; *and a recital in the bonds issued by them that it has been is a declaration of their decision*; and, in a suit by a *bond fide* holder of the bonds, the town is estopped from disputing their validity, and he is not bound to prove the genuineness of the signatures to the written assent.<sup>2</sup> Thus, under authority conferred by a special act, and by virtue of a popular election, the mayor and council of the "city of Fort Scott" were empowered to issue \$25,000 of bonds of the city for the purpose of procuring the right of way for a certain railway company through that city, and also procuring grounds for depots, engine-houses, machine-shops, and yard-room, and donating the same to the company, provided that the company, in the judgment of the mayor and council, had first given evidence of their intention to comply with certain specified conditions. The company did comply with the conditions, and the mayor and council, upon an understanding with the company, then agreed to deliver to it the \$25,000 of bonds in lieu of the grounds and right of way, and in full satisfaction of all the obligations resting on the city in relation thereto. The bonds were duly issued, and registered in the office of the State auditor, *who certified upon each bond that it had been regularly and legally issued, that the signature to it was genuine, and that it had been duly registered in accordance with the laws of the State.*

bound to look to the assessment against the property abutting on the avenues improved, made for the purpose of paying the bonds. *Commonwealth v. Pittsburgh*, 88 Penn. St. 66.

<sup>1</sup> *County of Moultrie v. Rockingham Ten-cent Savings Bank*, 92 U. S. 631.

<sup>2</sup> *Town of Venice v. Murdock*, 92 U. S. 494.

The bonds were thereupon delivered to the railroad company. It was held that the bonds were binding on the city.<sup>1</sup>

In another case, by an act of the legislature a township was authorized to take stock in a railroad, and an election was directed to be held, to determine whether such subscription should be made; and the amount of bonds voted was to be not above such a sum as would require a levy of more than one per cent per annum on the taxable property of the township, to pay the yearly interest on the bonds. The bonds were regularly executed by the chairman of the board, and attested by the county clerk and seal of the county; *and they recited that they were issued in accordance with the act, and in pursuance of the votes of three-fifths of the legal voters of the township at a special election duly held.* It was held in a suit brought on some of the coupons by a *bond fide* holder for value, that it could not be shown in defence that, at the time of voting and issuing the bonds, the value of the taxable property of the township was not in amount sufficient to authorize the voting and issuing of the whole series of them. And that all prerequisite facts to the execution and issue of the bonds being, by the statute, referred to the board of county commissioners, *the plaintiff was not bound, when he purchased, to look beyond the legislative act and the recitals of the bonds.*<sup>2</sup> But where the bonds are issued *without authority of law*, the want of power is not cured by a recital,<sup>3</sup> because in such a case there is nothing upon which to base an estoppel as against the municipal corporation.

SEC. 103. **Negotiable quality of Bonds.** — Corporate bonds payable to bearer or to a certain person or order, are now regarded as negotiable instruments, whether they are under seal or not;<sup>4</sup> and the

<sup>1</sup> *Converse v. City of Fort Scott*, 92 U. S. 503.

<sup>2</sup> *Marcy v. Oswego*, 92 U. S. 637; *Humboldt v. Long*, 92 U. S. 642; *Wilson v. Salamanca*, 92 id. 499. In *Sherman County v. Simons*, 109 id. 735, the act under which bonds were issued provided that the issue of bonds should not exceed the amount of indebtedness up to Jan. 1, 1875, etc. The bonds recited upon their face that they were issued under said act, but the amount issued largely exceeded the indebtedness. The court held that they were valid in the hands of *bond fide* holders, and that they were not bound to go behind the law and

the recitals of the bonds, and inquire into the amount of the county indebtedness.

<sup>3</sup> *Lippincott v. Pana*, 92 Ill. 24; *State v. School District*, 10 Neb. 544; *Gaddes v. Richland County*, 92 Ill. 119; *People v. Jackson County*, 92 Ill. 441.

<sup>4</sup> *Clapp v. Cedar County*, 5 Iowa, 15; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *State v. Union Township*, 8 Ohio St. 394; *State v. Van Horne*, 7 id. 327; *Knox Co. v. Aspinwall*, 21 How. (U. S.) 539. The purchaser of such bonds is only bound to know that there is a law authorizing their issue, and is not bound to look beyond the records of the corporation to ascertain whether they are true or not.

same is true of the interest coupons thereon, although they are not made payable to any particular person,<sup>1</sup> and are thus, in the hands

Clapp v. Cedar County, 5 Iowa, 15; Hannibal & St. Joseph R. R. Co. v. Marion County, 36 Mo. 294; Bank of Rome v. Rome, 19 N. Y. 20; San Antonio v. Lane, 32 Tex. 405; Aurora v. West, 22 Ind. 88; Society for Savings v. New London, 29 Conn. 174; Gelpeke v. Dubuque, 1 Wall. (U. S.) 175. In Barrett v. Schuyler County, 44 Mo. 197, in proceedings for a mandamus by the purchaser of certain bonds issued by Schuyler County Court to the North Missouri R. R. Co., to enforce payment thereof, it was held that although such bonds did not contain the words "value received, negotiable and payable without defalcation," as provided by the act concerning "bonds, bills, and notes," yet they imported a consideration, and possessed the ordinary elements of negotiable instruments; and in the hands of an innocent holder for value, before maturity, were not subject to antecedent equities. The act concerning bonds, etc., had in view classes of paper not usually employed in banking and commercial operations, and not adapted or intended for such uses. It was not meant to embrace bonds put in circulation as commercial securities, to be sold and used by a railroad company in defraying the expenses of constructing and equipping its road. A *bond fide* holder of such bonds, payable to bearer, who purchased them before maturity, may recover the amount thereof, although they were stolen, and the true owner advertised them. Consolidated Association of Planters v. Anegro, 28 La. An. 552; Elizabeth v. Force, 29 N. J. Eq. 587. But there can be no innocent holder of paper issued by a municipal corporation without power. Lindley v. Rattaken, 32 Ark. 619. Thus bonds issued by a county or other municipal corporation, under express authority, are negotiable, with all the qualities and incidents of negotiability. But if issued without authority, although in the form of negotiable bonds, the holder acquires no right to enforce payment of such bonds; but they are invalid, even in the hands of innocent holders. Hancock v. Chicot County, 32 Ark. 575. So, where

the statute required that county bonds, before they should obtain validity or be negotiated, should be registered in a prescribed way, county authorities issued some bonds without such registration, and in order to evade the law, dated them of a day before it was passed. It was held that they were void, even in the hands of a *bond fide* purchaser for value. Anthony v. Jasper County, 4 Dill. (U. S. C. C.) 136. And where bonds are made payable upon a condition, they are not negotiable. Blackman v. Lehman, 63 Ala. 547. Under Ala. Code, § 2098, the legal title to municipal bonds, payable to bearer, passes only by indorsement. Blackman v. Lehman, 63 Ala. 547.

<sup>1</sup> Smith v. Clark County, 54 Mo. 58. And a *bond fide* purchaser of coupons is not affected by a want of title in the vendor. Murray v. Lardner, 2 Wall. (U. S.) 110. But it has been held that coupons are not negotiable unless they contain apt words making them so. Augusta Bank v. Augusta, 49 Me. 507. See Ketcham v. Duncan, 96 U. S. 659. The fact that a coupon is overdue does not operate as notice to a *bond fide* purchaser of a bond that there are any defects therein, nor affect his position either to the principal or the coupons not yet matured. Cromwell v. Sac County, *ante*. National banks may purchase and hold coupons of this class of bonds, and maintain an action for their recovery in the name of the bank. First National Bank of North Bennington v. Bennington, 16 Blatchf. (U. S. C. C.) 15; Lyons v. Lyons National Bank, 19 id. 279. In order to render coupons valid, it is not necessary that they should be signed by all the officials who signed the bonds. The signature of some one of them is sufficient, in the absence of any statutory provision to the contrary. Lackawanna Iron Co. v. Letthenulf, 38 Wis. 152; First National Bank of St. Johnsbury v. Concord, 50 Vt. 257; Bank of Slatesville v. Slatesville, 7 Amer. & Eng. R. R. Cas. 178; Weyauwega v. Ayling, 99 U. S. 112; Anthony v. Jasper County, 101 id. 693.

of an innocent holder, freed from the equities existing between the original parties;<sup>1</sup> and he may recover the full amount of the bond, although he paid less than the face value therefor.<sup>2</sup> Interest at the legal rate in the State of issue is recoverable upon each coupon from the date of its maturity;<sup>3</sup> and the statute of limitations begins to run thereon from the date of its maturity.<sup>4</sup> Coupons are transfer-

<sup>1</sup> *Arents v. Commonwealth*, 18 Gratt. (Va.) 750; *Aurora v. West*, 7 Wall. (U. S.) 82; *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Thompson v. Lee County*, 3 Wall. (U. S.) 327; *Cromwell v. Sac County*, 94 U. S. 351; *Kenosha v. Lamson*, 9 Wall. (U. S.) 477. Where the bonds of a county, issued by the county court in payment of its subscription to the stock of a railroad company, show on their face that they were issued pursuant to a law which authorized their issue without the assent of the qualified voters of the county given at an election, and there is nothing on them to show that they were not regularly issued, it is not incumbent upon a purchaser of them to inquire whether the company has pursued the regular steps necessary to entitle it to receive them. Where the agents of the company have them for sale, he has a right to presume that they were lawfully entitled to them; and the fact that subsequently to making the subscription, but before the issue of the bonds, the company transferred its franchises to another company, does not alter the case. *County of Henry v. Nicolay*, 95 U. S. 619. A purchaser in good faith, and for value, before maturity, of a municipal bond, or a buyer from one who acquired the bond as such purchaser, holds it free from all infirmities of origin, except want of power in the makers, and prohibited consideration; and his right is to recover the amount due by the obligation, not merely reimbursement of what he paid. An unpaid and overdue coupon does not render the whole bond dishonored, so as to deprive a buyer of the character of a purchaser before maturity. *Cromwell v. Sac County*, 96 U. S. 51.

<sup>2</sup> *Cromwell v. Sac County*, 96 U. S. 51. The fact that as between the railroad company and the town the bonds are invalid, will not prevent a *bond fide* holder of a

coupon from recovering the amount; but he is required to establish his *bond fide* ownership of them, and a judgment in his favor upon other coupons detached from the same bonds does not estop the town. *Stewart v. Lansing*, 104 U. S. 505.

<sup>3</sup> *Pana v. Bowler*, 107 U. S. 529; *Fountleroy v. Hannibal*, 5 Dill. (U. S. C. C.) 219; *Welsh v. St. Paul, &c. R. R. Co.*, 25 Minn. 314; *Walnut v. Wade*, 103 U. S. 683; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 384; *Beaver County v. Armstrong*, 44 Penn. St. 53; *Aurora v. West, ante*; *North Penn. R. R. Co. v. Adams*, 54 Penn. St. 94; *San Antonio v. Lane*, 32 Tex. 405; *Hollingsworth v. Detroit*, 3 McLean (U. S. C. C.), 472. But in *Rose v. Bridgeport*, 17 Conn. 243, where a coupon acknowledging that a certain sum, being a half-year's interest on a certain bond, would be due to the bearer on a certain day, was issued; and a suit was brought by the holder to recover the sum specified in such coupon, with interest after it had become due, — it was held that the only obligation to pay either principal or interest arises from the bond, and that the action to recover the amount of the coupon is essentially an action upon the bond, and that interest is not recoverable upon the coupon after it became due. But see *First National Bank of North Bennington v. Bennington*, 16 Blatchf. (U. S. C. C.) 53, where it was held that an action upon a coupon is not an action upon the bond, and that an action of assumpsit will lie upon the coupon, although the bond itself is under seal. Where the bonds do not specify the rate of interest, but the act conferring the authority to issue them does, the rate specified in the act is the rate at which the interest should be computed. *People v. Ford County*, 63 Ill. 142; *Beattie v. Andrew County*, 56 Mo. 42.

<sup>4</sup> *Clark v. Iowa City*, 20 Wall. (U. S.) 583.



able by mere delivery,<sup>1</sup> and in order to maintain a suit upon them, demand and protest is not necessary.<sup>2</sup> The doctrine of constructive notice arising from *lis pendens* does not apply to negotiable securities of this class.<sup>3</sup> Where municipal bonds are upon their face made payable at a particular place, neither the municipal authorities nor the legislature can change the place of payment.<sup>4</sup>

<sup>1</sup> Ketcham v. Douglass, 96 U. S. 659.

<sup>2</sup> Nashville v. First National Bank, 57 Tenn. 402; Nashville v. Potomac Ins. Co., 58 id. 296.

<sup>3</sup> Bound v. Texas, &c. R. R. Co., 46 Tex. 316; Thompson v. Perrine, 103 U. S. 806; County of Warren v. Marcy, 97 U. S. 96; County of Cass v. Gillett, 100 U. S. 585. In Cass County v. Green, 66 Mo. 498, certain railroad bonds were fraudulently issued by means of a covinous conspiracy formed between two of the justices of the county court, the prosecuting attorney, and others; and, upon a division of the bonds, one of the conspirators received fifty-five thousand dollars thereof, which, two days thereafter, he sold to a banking firm, under circumstances which showed that the firm, as well as G., who afterwards bought them of the firm, had such notice of the fraud perpetrated as should have forbidden purchase. In an action by the county against G., to enjoin sale and cancel the bonds, it was held, first, that, although the evidence of such knowledge was not of a direct, positive character, it was sufficient if it established the fact of knowledge by reasonable inferences deduced from facts which were proven; second, that, although primarily the presumption favors the holder of paper acquired before maturity, such presumption must dwindle into insignificance under the circumstances of this case; third, that, the bonds having been fraudulently issued, the burden of showing that they were acquired in good faith devolved on the defendant; fourth, that the banking firm, as well as G., being chargeable with notice, G. could not successfully invoke the doctrine which permits even a purchaser with notice to purchase from one without notice; fifth, that the presumption arising from the fact that G., although conducting the trial and having his own deposition read thereat, failed to

explain certain statements tending to prove his lack of good faith, derived additional strength in the form of procedure, and the nature and organization of the court wherein the *bona fides* of the transaction was questioned; sixth, that, as one to whom G., the next day after the injunction was served upon him, had transferred the bonds, was not complaining, G. would not be heard vicariously to complain; seventh, that the bonds, although invalid, being apparently good, G.'s concealment of them, and threat to transfer them, constituted a ground for equitable interference analogous to that for removal of a cloud on title.

<sup>4</sup> In Dillingham v. Hook, 32 Kan. —, it was held that where the bonds of a county of the State of Kansas are payable upon their face at a particular bank in the city of New York, and such bonds were executed and delivered prior to the passage of the act entitled, "an act to provide for the establishment of a fiscal agency for the State of Kansas in the city of New York, and prescribing the duties of officers in relation thereto," approved March 6, 1874, said act cannot change the place of payment of the bonds of the county; and its provisions requiring the treasurer of the county by which the bonds were executed to remit to the fiscal agency of the State — being a place different from that where the bonds are payable — sufficient moneys for the payment of the bonds at the agency, is unconstitutional and void; the place of payment is a part of the contract, and a law which changes the terms of a contract impairs the same. HORTON, J., said: "By the contract the parties have fixed the rights and obligations, and this is regarded by the Constitution. A note or bond payable at a specified place is essentially different from one which is payable generally. *Lowe v. Bliss*, 24 Ill. 168; *Chitty on Bills*, 566; *Childs v.*

SEC. 104. *Bonâ fide* Holders. — A *bond fide* holder of a negotiable security is one who acquires it without notice of any infirmities, or equities outstanding in the maker; and in the case of municipal bonds, where the corporation issuing them has authority to issue them, in the hands of such a holder they may be recovered, although the conditions upon which they were issued have not been complied with.<sup>1</sup> But this rule has been held not to save such a holder as against conditions precedent contained in the statute itself,<sup>2</sup> nor

Lafin, 55 Ill. 159. If a county gives its negotiable bonds to pay certain moneys on or before a specified day at a bank named in the bonds, the place of payment is a part of the contract, and a law which changes the terms of the contract, or releases a part of its obligation, impairs the contract. If the act of 1874 is to be construed as requiring payment of the courthouse bonds of Leavenworth county, executed before the taking effect of that act, at the fiscal agency of the State in New York, the same being a place different from that stated in the bonds, the act must be held unconstitutional and void, as any law that arbitrarily changes the place of payment of negotiable paper after its execution cannot be upheld, because it attempts to change the terms of the contract; and the State Legislature can no more change the place of payment of negotiable paper than it can alter any other of the provisions of the contract. *Bronson v. Kinzie*, 1 How. (U. S.) 311; *Bank v. McVeigh*, 20 Gratt. (Va.) 457. If the Legislature of Kansas can make the bonds of Leavenworth county payable at the fiscal agency of the State in New York, when the bonds upon their face are payable at a particular bank in New York city, it has the authority to make them payable at any bank in Leavenworth city. This it cannot do, because such a change would deprive the holders of the bonds of the legal rights contracted when they purchased the same. The changing of the place of payment of negotiable paper already delivered, by an act of the legislature, is a very different thing from the State passing a law merely changing the remedy upon a contract, which is held not to be liable to any constitutional objection." *Bronson v. Kinzie*, *supra*.

<sup>1</sup> In *American Life Ins. Co. v. Bruce*,

105 U. S. 328, a town having authority by statute to issue bonds in aid of a railroad, by its popular vote directed the issue of negotiable bonds in aid of the railroad, and they were signed, sealed, and delivered to the railroad company by the constituted authorities of the town. Such bonds contained recitals that the requirements of the statute had been complied with. The statute did not make it obligatory on the town to impose conditions, upon the performance of which its liability should depend. It conferred simply the right to do so, leaving the town at liberty to prescribe conditions, or to make an unconditional subscription. It was held that after the bonds had passed into the hands of *bond fide* holders for value, the town could not escape liability by showing that conditions, or some of them imposed by popular vote, had not been complied with upon the part of the railroad company. The town having power, under the statute, to make an unconditional subscription, and to issue and deliver its bonds in advance of the construction of the road, it is then too late for the town to claim exemption, as against *bond fide* purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice, either from the statute or otherwise. *Brooklyn v. Ins. Co.*, 99 U. S. 370; *Miller v. Berlin*, 13 Blatchf. (U. S. C. C.) 801; *Douglass v. Niantic Savings Bank*, 97 Ill. 228; *First National Bank of St. Johnsbury v. Concord*, 50 Vt. 257; *Brooklyn v. Ins. Co.*, 99 U. S. 362.

<sup>2</sup> *Williams v. Roberts*, 88 Ill. 11. But see *Vicksburg v. Lombard*, 51 Miss. 111.

where there is a total lack of authority to issue the bonds.<sup>1</sup> The holder of bonds is presumed to have acquired them in good faith, but if in a suit upon them the defence is such as to require him to show that value was paid, it is not in every instance necessary for him to show that *he* paid it, as his title will be sustained if any previous holder gave value,<sup>2</sup>—the rule being, that a person who succeeds to the title of a *bond fide* holder is entitled to stand upon such title, although not a *bond fide* holder himself.<sup>3</sup>

If the bonds were fraudulently issued, the burden is upon the holder to show that he not only acquired them for value, but also in good faith, without notice or knowledge of the infirmity.<sup>4</sup> A con-

<sup>1</sup> Lippincott v. Pana, 92 Ill. 24. In Allen v. Louisiana, 103 U. S. 80, it appeared that the constitution of Missouri forbids the legislature to authorize any city to become a stockholder in, or loan its credit to any corporation without two-thirds of the qualified voters at an election shall assent thereto. The charter of the city of L., in that State, provides in one section that the funded city debt, including \$100,000 to be subscribed to railroads terminating at, or passing through the city, shall not exceed \$200,000, provided that it may be increased to \$250,000 by ordinance submitted to the taxpayers of the city at an election. A majority of the votes cast at such election shall determine the question for or against such ordinance. Another section provides that it may subscribe for the stock of a railroad company connecting with the city, upon a similar submission and vote. Another section provides that no subscription to stock of any corporation shall be made except as provided by law, and that no appropriation shall be made for any improvement beyond the city limits unless a majority of all votes cast at an election at which the question is submitted shall be in favor of the appropriation. It was held that the statute gave no authority to the city to subscribe for stock in a railroad corporation, and that bonds issued by the city under such statute would be void in the hands of an innocent holder for value. Board of Education v. Taft, 7 Ill. App. 571. But in a case arising from Missouri under an act of the legislature, the county courts of counties were

authorized to subscribe, in behalf of townships in their respective counties, to the capital stock of any railroad company within that State, "building, or proposing to build, a railroad into, through, or near such township," and to issue bonds in the name of the county in payment of such subscription. There was a vote of a township in favor of issuing bonds in aid of a particular railroad company. The subscription was made, and the bonds issued, reciting that they were authorized by a vote of the people, and were issued under and pursuant to an order of the county court by authority of the act. When the vote was taken, and the bonds issued, the company did not propose to build a road into or through the township; but it was proposing to build one from a point nine miles distant from the township to a farther distance. Interest on the bonds was paid for three years. In a suit on coupons of the bonds by a *bond fide* holder for value, it was held that the courts should acquiesce in the determination by the qualified voters and the local authorities that the proposed road was near the township, and hold that there was legislative authority for issuing the bonds. VanHostrup v. Madison, 1 Wall. (U. S.) 291; Meyer v. Muscatine, id. 391; Kirkbride v. Lafayette County, U. S.

<sup>2</sup> Montclair v. Ramsdell, 107 U. S. 147.

<sup>3</sup> Foote v. Hancock, 16 Blatchf. (U. S. C. C.) 343; New Buffalo v. Iron Co., 105 U. S. 73.

<sup>4</sup> Bailey v. Lansing, 13 Blatchf. (U. S. C. C.) 424; Irwin v. Ontario, 18 id. 259; Phelps v. Lewiston, 15 id. 131; Whiting

tractor to whom bonds are delivered in payment for work in building the railroad, is held to be a holder for value, although he took the bonds upon an antecedent debt, if he took them in good faith.<sup>1</sup> The rule is, that a party who takes negotiable coupon bonds, before due, for a valuable consideration, without knowledge of any defect of title and in good faith, holds them by a title valid against all the world. *Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transaction, will not defeat his title.* That result can be produced only by bad faith on his part.<sup>2</sup> Bonds for the payment of money, with interest warrants attached, are everywhere encouraged as a safe and convenient medium for the settlement of balances among mercantile men; any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy. Such instruments are protected in the possession of an indorsee, not merely because they are negotiable, but also because of their general convenience in mercantile affairs.<sup>3</sup>

*v. Potter*, 18 id. 165; *Phelps v. Yates*, 16 id. 192.

<sup>1</sup> *Footo v. Hancock*, 16 Blatchf. (U. S. C. C.) 343.

<sup>2</sup> *Murray v. Lardner*, 2 Wall. (U. S.) 110.

<sup>3</sup> *Smith v. Sac County*, 11 Wall. (U. S.) 150. In *Florida, &c. R. R. Co. v. Schutte*, 103 U. S. 118, by an act of the legislature of Florida, the governor of that State was authorized to exchange the bonds of the State with the F. R. R. Co. and the J. R. R. Co., dollar for dollar, to a specified amount per mile of railroad, the bonds of the railroad companies to be a statutory lien upon the roads to secure the payment of the State bonds. This was done in order to aid the railroads by lending to them the credit of the State. The exchange was duly made, the F. R. R. Co. receiving \$1,000,000, and the J. R. R. Co. \$3,000,000 of the State bonds. These bonds the companies sold to purchasers in Holland, through an agency established in London. The railroad companies soon defaulted upon the interest of their bonds given to the State, and the State in turn defaulted upon its bonds given to the railroad com-

panies, and by the latter sold to purchasers in Holland. Soon afterward the Supreme Court of Florida adjudged the bonds of the State given to the railroad companies to be null and void for want of authority (see 15 Fla. 455-490; 16 id. 708), and the railroad companies sought to evade the payment of their own bonds by alleging that they were issued and exchanged without the sanction of the companies in their corporate capacity. In this condition of affairs Schutte and others, the Dutch bondholders, claimed to be entitled to the bonds of the railroad companies held by the State, and brought action to have it declared that they, as holders of the State bonds, have a lien on the railroads to the amount of the bonds so held by them, and to have the railroad sold to satisfy the same. The railroad companies brought suit to have their bonds cancelled. It was held that the bondholders of the State bonds are in the position of purchasers for value and in good faith, and are entitled to relief accordingly; that although the State bonds are unconstitutional, the railroad companies are not free from responsibility to the holders. The bonds, as obligations of the

Where the bonds are payable upon a condition, or where there is any uncertainty as to the amount of principal or interest, and the place of payment is left blank, they are deprived of the character of negotiable instruments. Thus, where bonds were executed by a corporation for a certain amount in pounds sterling if payable in London, or for a certain amount in dollars if payable in New York or New Orleans, and by a provision in the bond the president was authorized by his indorsement to fix the place of payment, and each bond contained an indorsement signed by the president leaving the place of payment blank, it was held that the bonds were not negotiable; and that the bonds having been stolen, and gone into the hands of innocent holders, they had no authority to fill the blanks; but that they held the bonds subject to any defect of title arising from the manner in which they were put in circulation.<sup>1</sup> But a blank for the name of the payee may be filled by any holder, by writing his own name therein, as the bond has the same qualities of negotiability as a bond completely filled; and the authority to fill the blank is implied from the obligors putting it in circulation in that condition.<sup>2</sup>

State, are void; but as against the companies which sold them, they are good. Having been put on the market by the companies as valid bonds, the companies are estopped from setting up their unconstitutionality. A statutory lien in the nature of a first mortgage having been given to the State to secure such bonds on the property of the railroad companies, the governor of the State has full power to take possession of the railroads and sell them, and hold the proceeds for the redemption of the State bonds held by *bond fide* holders.

<sup>1</sup> Jackson v. Vicksburgh, &c. R. R. Co. 2 Woods (U. S. C. C.), 141.

<sup>2</sup> Boyd v. Kennedy, 38 N. J. L. 146. In Indiana, &c. R. R. Co. v. Sprague, 103 U. S. 756, C. owed S., a woman, \$25,000, for which she held his note. He sold her \$75,000 in bonds of the M. railroad company, which she paid for partly by the note and partly by other securities. The company depositing its interest, she, at his instance, returned the bonds, and received from him in exchange bonds of the I. railroad company for \$75,000. This was June 24, 1871. Those last bonds were dated April 1, 1870, were negotiable, were

secured by mortgage of that date, and each had attached interest coupons from the same date, two of which were overdue, being payable October 1, 1870, and April 1, 1871. The bonds and the mortgage contained a provision authorizing foreclosure in case of default in interest for six months; the bonds required a demand to be made, but the mortgage not requiring it. At the time she received the bonds the I. railroad was only a projected railroad. C. was vice-president and acting president of the company. The bonds were regularly executed and in possession of C., who had no express authority to dispose of them, but who claimed a lien on them for advances made to the company. It was held that S. was a *bond fide* purchaser for value from C., and could enforce the bonds against the I. company. Possession of negotiable bonds carries with it the title to the holder. Murray v. Lardner, 2 Wall. (U. S.) 121. S., therefore, bought the bonds of a person presumptively the owner, and paid for them a full and valuable consideration. The provision of the bonds requiring demand before the debt became due

**SEC. 105. Submission to Popular Vote, when necessary: Consents, Petitions, etc.**—Except where there is an express constitutional restriction upon the power of the legislature in that respect, it may confer upon municipal corporations authority to subscribe for stock in a railroad corporation, or to pledge its credit therefor, without submitting the question to a vote of the people.<sup>1</sup> But there is now no question but that the legislature may direct that the question shall be submitted to a vote of the people, without rendering the act obnoxious to any constitutional objection upon the ground that it amounts to a delegation of legislative powers.<sup>2</sup> But the question

controlled that of the mortgage, which did not. The bonds were, therefore, not due when S. purchased. The mere presence of two unpaid coupons upon the bonds purchased was not of itself sufficient evidence of the dishonor of the bonds to which they were attached. This point has been expressly ruled in *Cromwell v. Sac County*, 96 U. S. 51. In that case it is said: "The non-payment of an instalment of interest when due could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity the purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities." To the same effect see *Nat. Bank of N. A. v. Kirby*, 108 Mass. 497, and *Boss v. Hennett*, 15 Wis. 260. In the case of *Parsons v. Jackson*, 99 U. S. 434, the bonds which were the subject of controversy had never been issued, but had been stolen from the office of the company. They were made payable either in New Orleans, New York, or London, as the president of the railroad company might by his indorsement on the bonds determine. The bonds contained no indorsement of the president designating the place of payment; they were offered in the New York market and sold for a very small consideration; and coupons for several years, due and unpaid, were attached to them. The court held that all these circumstances affected the purchaser with notice of the invalidity of the bonds. It is true, the court said, that the presence of the past-due and unpaid coupons was of itself an evidence of dishonor sufficient to put the purchaser on inquiry. But the case did

not turn on this circumstance alone. There were other significant indications of the invalidity of the bonds, and the opinion must be restricted to the case before the court. Even if S. was put on inquiry, the facts that she would have discovered would have explained satisfactorily the presence of the unpaid coupons.

<sup>1</sup> *Thompson v. Lee County*, 3 Wall. (U. S.) 337; *McCallie v. Chattanooga*, 3 Head (Tenn.), 317; *Ralls County v. Douglass*, 105 U. S. 723. A statute providing that a municipality may issue bonds in aid of a particular railroad, "for such sum or sums . . . as may be agreed upon by and between the directors of the railroad and the proper officers of" such municipality, was held constitutional within the provisions of a clause therein requiring the legislature to restrict the power of taxation, borrowing money, etc., in municipalities, and an enabling act authorizing any municipality within the county to issue bonds in aid of a railroad running through any part of the county, prospective in its intent, and to authorize a village incorporated subsequently to issue such bonds, was also held to be valid. *Long v. New London*, 5 Biss. (U. S. C. C.) 539.

<sup>2</sup> *Starin v. Genoa*, 23 N. Y. 439; *Bank of Rome v. Rome*, 18 id. 38; *Gould v. Sterling*, 23 id. 456; *Hobart v. Supervisors*, 17 Cal. 23; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446; *Grant v. Courter*, 24 id. 232; *Moens v. Reading*, 21 Penn. St. 188; *Cincinnati, &c. R. R. Co. v. Clinton County*, 1 Ohio St. 77; *Police Jury v. McDonough*, 8 La. An. 341; *Slack v. Maysville, &c. R. R. Co.*, 13 B. Mon. (Ky.) 9; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *Cotton v. Leon County*, 6 Fla. 610; *Stein v.*

must be submitted to the *legal voters* of the town, and cannot be confined to resident taxpayers without reference to the question whether they are legal voters or not.<sup>1</sup>

The power of a municipal corporation is not exhausted by one meeting, but any number of meetings may be held until the subscription is actually made. Thus, an act of the legislature authorized a city to issue bonds to the amount of \$100,000, to be loaned on proper security to a corporation chartered at the same session, to aid in the construction and completion of its road, — the act containing a proviso that it should not take effect until approved by two-thirds of the electors present at a city meeting held for that purpose. Different meetings of the city were holden for the purpose of acting on the subject, and a vote was taken at each, and less than two-thirds of the votes were cast in its favor. Another meeting was subsequently called and holden, at which a vote of more than two-thirds was obtained in favor of the approval. It was held that the power of the city on the subject was not exhausted by its first action, and that the action of the last meeting was a valid acceptance of the power to issue the bonds.<sup>2</sup>

Where the statute authorizes a town, city, or county to subscribe to the stock of *any* railroad company in the State, *not exceeding* a certain sum, the power of the town, etc., is not exhausted by a subscription for that amount in one company, but it may subscribe the same amount in any other company or companies, so long as the requisite consent to do so is obtained in the mode provided in the statute;<sup>3</sup> and the same rule prevails where a municipal corporation is authorized to subscribe *not exceeding* a certain sum to the stock of a certain railroad; and several subscriptions may be made at different times, provided the aggregate amount thereof does not exceed the amount named in the act.<sup>4</sup> Where a town, etc., is authorized to vote aid to a railroad company to an amount not exceeding ten per cent of the valuation of the town, etc., *the valuation in force at the time the vote was taken* controls, although another valuation is being made and is in process of completion.<sup>5</sup> A vote to make a donation to a

Mobile, 24 Ala. 591; Patterson v. Yuba County, 13 Cal. 175; Blanding v. Burr, 13 id. 343; Hobart v. Butte County, 17 id. 23; Lafayette, &c. R. R. Co. v. Geiger, 34 Ind. 185; Bank of Rome v. Rome, 18 N. Y. 38; Louisville, &c. R. R. Co. v. Davidson County, 1 Sneed (Tenn.), 637.

<sup>1</sup> Harrington v. Plainview, 27 Minn. 224.

<sup>2</sup> Society for Savings v. City of New London, 29 Conn. 174.

<sup>3</sup> Chicot County v. Lewis, 103 U. S. 164.

<sup>4</sup> Empire v. Darlington, 101 U. S. 87.

<sup>5</sup> Hunt v. Hamilton, 25 Kan. 76.

railroad company, for which a tax is to be levied and the money paid, is entirely distinct from one to create a debt in respect to such donation, and will not be construed to authorize the issue of bonds of the town for the sum so voted; and the fact that bonds were issued and taxes have been levied to pay the interest thereon, will not estop the town from setting up want of power to create the debt.<sup>1</sup> The repeal of its charter does not take the power to issue its bonds after the subscription has been duly made.<sup>2</sup> Where aid is permitted to be furnished upon petition of a majority, etc., of the taxpayers or voters of a town or county, the requisite number of signers must be procured before any steps can legally be taken relating thereto; but several petitions may be signed and presented at different times.<sup>3</sup> Joint-owners of property must be counted separately,<sup>4</sup> — as the joint-owners of lands, partners, etc.<sup>5</sup> Where a majority of taxpayers only is required, non-residents who pay taxes and who are enrolled for that purpose, must be counted in estimating the number necessary to unite in the petition;<sup>6</sup> and the last assessment-roll of the town containing the names of the persons owning or representing property within the limits of the town, is the criterion.<sup>7</sup>

The petition required is that of the taxpayers, and the act is not satisfied by the petition of an agent.<sup>8</sup> But it is not necessary that the petitioners should be the owners of the property for which they are taxed. If they represent it, in any capacity, and are assessed on the tax-list as so representing it, then they are taxpayers, and may become petitioners.<sup>9</sup> It is not sufficient that the signatures to

<sup>1</sup> Schaffer v. Bonham, 95 Ill. 368.

<sup>2</sup> Babcock v. Helena, 34 Ark. 499.

<sup>3</sup> People v. Hugbitt, 5 Lans. (N. Y.) 89.

<sup>4</sup> People v. Franklin, 5 Lans. (N. Y.) 129.

<sup>5</sup> People v. Hugbitt, *ante*.

<sup>6</sup> People v. Oliver, 1 T. & C. (N. Y.) 570.

<sup>7</sup> People v. Hulbert, 59 Barb. (N. Y.), 446.

<sup>8</sup> People v. Smith, 45 N. Y. 772; see also People v. Peck, 62 Barbour (N. Y.), 545; 4 Lans. (N. Y.) 529.

<sup>9</sup> People v. Hulbert, *ante*. In New York under the statute it is held that a petition to the county judge, under the statute for bonding a town in aid of a railroad, must set forth that the

petitioners are a majority of the taxpayers of the town, appearing on the last preceding assessment-roll, not including those taxed for dogs or highway tax only; an averment they are a majority, and that their names appear thereon, is insufficient. Wellsborough v. New York & Canada R. R. Co., 76 N. Y. 182. And the provision that the commissioners shall not so issue bonds in aid of a railroad that more than ten per cent of the principal of the whole amount shall become due in any one year, does not repeal a statute under which they can elect whether to make the bonds payable thirty years from date or at a less time. Syracuse Savings Bank v. Seneca Falls, 21 Hun (N. Y.), 304.



the petition are proved, unless such petitioners are in some way identified as the persons named on the "last preceding tax-list or assessment-roll." If the names upon both are identical, this is *prima facie* evidence that the persons are the same.

The authority conferred by the act must be exercised in a strict conformity to, and by a rigid compliance with, the letter and spirit of the statute.<sup>1</sup> Where it is the duty of the common council of a city to determine whether the requisite number of the freeholders of the city have petitioned for the subscription (no other tribunal having been provided for the purpose), and it has passed upon that question, its determination is conclusive, unless set aside in some direct proceeding for that purpose.<sup>2</sup>

In proceedings under an act to issue bonds in aid of the construction of a railroad, the *petition* must direct whether it is in *stock*, or in *bonds*, that the money to be raised shall be invested.<sup>3</sup> If the statute gives to a town authority to give aid to either of two railroads, the town as such must designate the road to which the aid shall be given, and this power cannot be delegated to a committee.<sup>4</sup> The fact that false representations were made to voters to induce them to vote for furnishing aid, will not invalidate the result;<sup>5</sup> but if a portion of those voting for aid were aliens or persons who are not legal voters, the subscription is invalid and cannot be enforced.<sup>6</sup>

Authority given to issue bonds for a specific purpose does not confer authority to issue them for any other purpose, and if under cover of such authority they are issued for another purpose, they are void. Thus, the charter of a city provided for the construction of a city hall and other structures of public necessity and utility, and for the issuing of bonds for the payment of the same. It was held that the city had no power to issue bonds to pay for a tract of land

<sup>1</sup> *People v. Smith*, 45 N. Y. 772.

<sup>2</sup> *Evansville, Indianapolis & Cleveland R. R. Co. v. Evansville*, 15 Ind. 395.

<sup>3</sup> *People v. Van Valkenburg*, 63 Barb. (N. Y.) 105.

<sup>4</sup> *Monadnock R. R. Co. v. Peterboro*, 49 N. H. 281.

<sup>5</sup> *Plattville v. Galena, &c. R. R. Co.*, 43 Wis. 493; *Cedar Rapids, &c. R. R. Co. v. Boone County*, 34 Iowa, 45. In *State v. Lake City*, 25 Minn. 404, to a writ of mandamus reciting that the ordinance, whose provisions in aid of a railway company were sought to be enforced against the town, was duly passed by a vote of a

majority of the supervisors of said town, and ratified by the legal voters thereof, at an election held for that purpose, pursuant to the statute authorizing it, the portion of an answer averring that the voters were influenced by false promises that the company would build its engine-houses, car and machine-shops in said town, and thereby increase the property and population,—was stricken out, as irrelevant. So, also, as to the portion of such answer averring that the supervisors had been corrupted by fraudulent promises and considerations.

<sup>6</sup> *People v. Cline*, 63 Ill. 594.

to be given to a railroad company, upon which to build its depot and machine-shops; and that there could be no *bond fide* holders of the bonds without notice.<sup>1</sup>

Where the charter of a railroad company contains a clause allowing it to receive subscriptions from "any town, city, village, or county," this does not authorize any municipal corporation to subscribe for stock which could not subscribe under the statute existing, conferring such power; and where the general law relating thereto restricts subscriptions to "cities and counties," the charter provision does not enlarge the terms of the grant.<sup>2</sup>

**SEC. 106. Rule where Authority is given in Charter of the Railroad Company, etc.** — Where the charter of a railroad company authorized it to receive subscriptions to its stock from a county without a vote of the people, it was held that a prior special act of the legislature, requiring a vote of the taxpayers as a condition precedent to such subscription, did not affect the validity of bonds in the hands of innocent purchasers.<sup>3</sup>

**SEC. 107. Where two Acts confer Authority.** — An act of the legislature authorized a town to subscribe to the stock of a horse or street railroad, and to levy a tax upon the real and personal property within a certain district for the payment of such subscription; and further provided that "said district, in subscribing to a horse or street railroad company, and in voting taxes to be levied for the same, shall be governed by the law regulating the subscription to railroad companies of municipal townships." This latter act authorized the issuing of bonds. It was held that the whole act, construed together, and embracing the provision of the township act, authorized the issuing of bonds as well as the voting of a tax.<sup>4</sup>

**SEC. 108. Out of what Fund should be paid.** — A county court, authorized to levy a tax for county purposes of not more than one half of one per cent upon the assessed value of the taxable property of the county for each year, subscribed for stock of a railroad company and issued bonds in payment therefor, pursuant to a law which authorized a levy of a special tax "not to exceed one twentieth of

<sup>1</sup> *Lewis v. Shreveport*, 3 Woods (U. S. C. C.), 205. If a municipal corporation has the right to borrow money for a specific purpose on bonds running for twenty years, and by mistake issues bonds for the same purpose under another grant of authority, such bonds running for a less period, the bonds so issued are legal obli-

gations. *Singer Manuf. Co. v. Elizabeth*, 42 N. J. L. 249.

<sup>2</sup> *Pitzman v. Freeburg*, 92 Ill. 111.

<sup>3</sup> *Burr v. Chariton County*, 2 McCrary (U. S. C. C.), 603.

<sup>4</sup> *Henderson v. Jackson County*, 2 McCrary (U. S. C. C.), 615.

one per cent, upon the assessed value of the taxable property for each year," to pay the same. It was held that if the levy of one twentieth of one per cent was insufficient, the holders of such bonds were entitled to be paid the balance out of the general funds of the county, but not out of the general revenues.<sup>1</sup>

SEC. 109. **Majority, two-thirds Vote, etc.** — Where the enabling act provides that it shall become operative if a majority, or two-thirds, etc., of the legal voters of the town shall so determine by vote, *a majority or two-thirds of the legal voters actually voting at the meeting called for that purpose* is meant, and not a majority or two-thirds of all the legal voters in the town;<sup>2</sup> and all the voters who do not attend the meeting are presumed to assent to the expressed will of a majority of those voting, unless the law providing for the election otherwise declares.<sup>3</sup> But where the statute provides for the pledging of the credit of a town, or issuing bonds, etc., to aid in the construction of a railroad if a majority or two-thirds of the legal voters who are taxpayers sign a petition to that effect, a majority or two-thirds of all the legal voters *who are taxpayers in the town* is intended, and unless obtained, the authority cannot be granted; and if the requisite number is not obtained, any effort to issue bonds is illegal.<sup>4</sup> Where, as is often the case in these statutes,

<sup>1</sup> *United States v. Knox Co.*, 2 McCrary (U. S. C. C.), 625.

<sup>2</sup> *Milner v. Pensacola*, 2 Woods (U. S. C. C.), 632; *St. Joseph's Township v. Rogers*, 16 Wall. (U. S.) 644; *Webb v. Lafayette County*, 67 Mo. 353; *Cass County v. Johnson*, 95 U. S. 366; *Woodson v. Brassfield*, 67 Mo. 331; *People v. Chapman*, 66 Ill. 137; *People v. Hoop*, 67 id. 62; *Melvin v. Lisenby*, 72 id. 63; *Reiger v. Beaufort*, 70 N. C. 319; *Cass v. Jordan*, 95 U. S. 373; *Hawkins v. Carroll County*, 50 Miss. 735; *Louisville, &c. R. R. Co. v. Tennessee*, 8 Heisk. (Tenn.) 663.

<sup>3</sup> *Cass County v. Johnston*, 95 U. S. 360; overruling *Harshman v. Bates Co.*, 92 U. S. 596, to the contrary.

<sup>4</sup> Under an act authorizing a town to subscribe for stock of a railroad company, and to issue its bonds therefor, certain of the taxpayers executed and acknowledged revocations of their consents, and delivered them to the assessors while the consents were before them, and before they

had been acted upon. Those of the taxpayers not executing the revocations were insufficient in number to constitute the majority sufficient to bind the town. The assessors, however, disregarded the revocations and filed the statutory affidavit. Upon suit brought by the town to compel the cancellation of the bonds issued, it was held that it was immaterial that the revocations were not filed in the town or county clerk's office, and that a tender of the stock received for the bonds was not necessary as a prerequisite to bringing the action. *Springport v. Teutonia Savings Bank*, 84 N. Y. 403. Where an affidavit is required of town officers by the statute providing for the issue of bonds in payment for railroad stock, it is not conclusive as to the requisite consent of a majority of taxpayers, but is *prima facie* evidence only, and may be disputed in a suit brought upon the bonds by one taking them in good faith and for value. *Cagwin v. Hancock*, 84 N. Y. 532.

the authority to bond the town, etc., is made to depend upon securing the consent of a majority or any other proportion of the legal voters and taxpayers of the town, etc., any person signing the consent may, at any time before action has been taken thereunder, revoke his consent,<sup>1</sup> but not afterwards.<sup>2</sup>

Where a two-thirds vote is necessary to appropriate money to aid in the construction of a railroad, a two-thirds vote is also necessary to raise it.<sup>3</sup>

SEC. 110. **Who should make Subscriptions.**—Where the act is silent as to who shall make the subscription for a town, the subscription should doubtless be made by those officers who by law are endowed with the power to execute contracts for the town. But where the act provides that two or more commissioners shall be appointed for that purpose, they alone can make the subscription; and in performing this act they are agents of the town, and of no other party in that business, and are responsible to no other party for the manner in which it is executed, even though they incorporate in their contract of subscription conditions beyond what are contained in the instrument of assent, by which they received their appointment and authority; and the insertion of such conditions by them is not a void act, *unless the town chooses to make it so; and no other party can repudiate them.* Their powers are joint, and *all* must act, and the act of a majority is not sufficient. When they have made their subscription and delivered it to the company, their powers are exhausted, and they cannot make another subscription in lieu of the first.<sup>4</sup>

Where the question as to whether a subscription shall be made, and the amount thereof, is left to certain officers or boards, their decision is final, and must cover every point submitted to them; and they cannot leave any point required to be decided by them to the discretion of any other persons or board. Thus, where an act of the legislature authorized the subscription to the stock of a railway company, to be made by certain counties upon the recommendation of the grand jury being first made, it was held that all discretionary

<sup>1</sup> *People v. Wagner*, 1 T. & C. (N. Y.) 221; *People v. Deyoe*, 1 T. & C. (N. Y.) 142.

<sup>2</sup> *First National Bank of North Bennington v. Dorset*, 16 Blatchf. (U. S. C. C.) 62; *People v. Hatch*, 1 T. & C. (N. Y.) 113; *Noble v. Vincennes*, 42 Ind. 125.

<sup>3</sup> *Monadnock R. R. Co. v. Peterboro*, 49 N. H. 281.

<sup>4</sup> *Danville v. Montpelier, &c. R. R. Co.*, 43 Vt. 144. But see *First National Bank of North Bennington v. Arlington*, 16 Blatchf. (U. S. C. C.) 57, where bonds signed by only *two* out of *three* selectmen were held valid.

power touching the subscription was given exclusively to the grand jury, and they could not transfer any part of it to the county commissioners; that the recommendation of the grand jury that an amount not exceeding a certain sum be subscribed, was not a compliance with the provisions of the act. The amount should have been designated. The law in force at the time that the proposal for a contract is made, is a part of it, and if the proposal is not accepted until after the law is essentially changed, such acceptance comes too late. Where the act authorizing the subscription provided that the acceptance of its provisions by the company should also be deemed an acceptance of another act imposing certain restrictions on the corporation, and the latter act was repealed before the acceptance of the subscription, and after the recommendation of the grand jury, it was held that the subscription could not be subsequently made.<sup>1</sup>

**SEC. 111. Denomination of Bonds.** — If the act giving authority for their issue fixes the denomination of the bonds, that is conclusive; but if the denomination of the bonds is not fixed by the act, it may be fixed by the officers charged with their issue, provided the total amount issued does not exceed that set forth in the proposal accepted by the vote of the qualified voters.<sup>2</sup>

**SEC. 112. By whom Bonds should be executed.** — When by legislative enactment a town is empowered to raise money by a loan for a specified purpose, and the act is silent as to the officers who shall make the loan and issue the bonds, the municipal officers would be authorized to perform those duties; and before issuing the bonds, such officers must determine whether the town has executed the power conferred upon it in accordance with the provisions of the act; and their recital upon the face of the bond of the facts in regard to that matter, as they had determined them to be, would be conclusive upon the town in an action by a bondholder for value to recover the amount of an interest coupon.<sup>3</sup> But where the statute specially provides what officers shall issue them, only the officers designated can do so.<sup>4</sup> The fact that the officers signing the bonds were not legally

<sup>1</sup> *Mercer County v. Pittsburgh, &c.* R. R. Co., 27 Penn. St. 389.

<sup>2</sup> *County of Greene v. Daniel*, 102 U. S. 187.

<sup>3</sup> In its ordinary, popular signification, the word "bond" includes instruments not under seal, by which the maker binds himself to pay money or do some specified act, as well as instruments for like pur-

poses under seal; and in construing town records, evidentiary of the action of the town, the word is to be so construed. *Lane v. Embden*, 72 Me. 354.

<sup>4</sup> *Danville v. Montpelier, &c. R. R. Co.*, 43 Vt. 144. But a majority of them may perform the act. Thus where only two out of three of the selectmen of a town signed the bonds, they were held valid.

elected, if they are officers *de facto*, will not defeat liability upon the bonds as against a *bond fide* holder. Thus, it has been held that county bonds issued by a *de facto* county court, sealed with the seal of the court, and signed by the *de facto* president, cannot be impeached in the hands of an innocent holder by showing that the president was not *de jure* one of the justices of the court, nor by showing that the company to whose stock the subscription was made was not organized within the time limited by its charter.<sup>1</sup>

SEC. 113. **Ratification by Legislature, etc : Effect of.** — Where a corporation has authority to issue bonds in aid of a railroad, but there are *defects* in the bonds issued, either as to the meeting at which the vote was taken or in their form or manner of execution, the corporation itself by its acts, or the legislature by special enactment may ratify and render them valid ;<sup>2</sup> but where there is a total

First National Bank of North Bennington v. Arlington, 16 Blatchf. (U. S. C. C.) 57. In Statesville Bank v. Statesville, 84 N. C. 169, a town was authorized subject to a vote of the qualified voters, to issue certain coupon bonds, *which were to be signed by the town-magistrate, treasurer, and commissioners.* After a vote approving the same, the bonds were issued, but signed only by the town-magistrate and treasurer. It was held that the act was directory, and the omission of the commissioners to sign the bonds was not fatal to a recovery upon them.

<sup>1</sup> Ralls County v. Douglass, 105 U. S. 728. In Saurhering v. Iron Ridge, &c. R. R. Co., 25 Wis. 447, it was held that the court would not declare bonds of the town void, or their delivery to the *de facto* officers of the company restrained, upon the ground that such officers were not legally elected.

<sup>2</sup> January v. Johnson County, 3 Dill. (U. S. C. C.) 392 ; Atchison, &c. R. R. Co. v. Jefferson County, 17 Kan. 29 ; Bissell v. Jeffersonville, 24 How. (U. S.) 287 ; Sykes v. Columbus, 55 Miss. 115 ; Thomson v. Lee County, 3 Wall. (U. S.) 327 ; St. Joseph v. Rogers, 16 Wall. (U. S.) 644 ; Campbell v. Kenosha, 5 id. 194 ; Beloit v. Morgan, 7 id. 619 ; Bates County v. Winters, 97 U. S. 83 ; Bridgeport v. Housatonic R. R. Co., 15 Conn. 475 ; Lee County v. Rogers, 7 Wall. (U. S.) 181 ; South Ottawa v. Perkins, 94 U. S.

260 ; Capes v. Charleston, 10 Rich. (S. C.) 491 ; Rogers v. Smith, 5 Hun (N. Y.), 475 ; Horton v. Thompson, 7 id. 452 ; Dallas County v. McKenzie, 94 U. S. 660 ; Redd v. Henry County, 31 Gratt. (Va.) 695 ; Duaneburgh v. Jenkins, 57 N. Y. 177 ; Williams v. Duaneburgh, 66 N. Y. 127 ; Alexander v. McDowell County, 70 N. C. 208 ; Shelby County v. Cumberland, &c. R. R. Co., 8 Bush (Ky.), 209 ; Keithsburg v. Frick, 31 Ill. 405. That a municipal corporation may waive and ratify irregularities in subscriptions, see Leavenworth, &c. R. R. Co. v. Douglass County, 18 Kan. 169. But see, holding that the legislature cannot give validity to subscriptions which are void because of a non-compliance with the statute, Elmwood v. Morey, 92 U. S. 289 ; Marshall v. Silliman, 61 Ill. 218 ; Richland County v. People, 3 Brad. (Ill.) 210 ; Wiley v. Silliman, 61 Ill. 218 ; William v. Roberts, 88 id. 11 ; Gaddis v. Richland County, 92 id. 114. But the better opinion seems to be that such acts are valid where the legislature had the power to confer authority upon the corporation to issue bonds which would be valid, executed as those were the issue of which is sought to be legalized ; and the decisions in the United States Supreme Court to the contrary do not express the prevailing doctrine of the court, but simply follow the decisions of the appellate court in the State in which the case arose. Leslie v. Urbana,

want of authority to issue them, no ratification of the issue by the corporation itself can render them valid;<sup>1</sup> but the legislature may

2 Biss. (U. S. C. C.) 435 ; Thompson v. Perrine, 106 U. S. 589. In *Duanesburgh v. Jenkins*, 57 N. Y. 188, decided in 1874 by the Commission of Appeals, JOHNSON, J., reviewed the prior decisions of the Court of Appeals upon the question discussed in *People v. Batchellor*, 53 N. Y. 131. In reference to the latter case it was intimated that the language of the court upon some of the questions discussed was not in harmony with its previous decisions, and that the opinion should be limited to the point adjudged upon the facts existing in that case. The conclusions announced in *Duanesburgh v. Jenkins*, after a careful analysis of previous decisions in that State, were that the authority of the legislature to enable towns and other civil divisions of the State to subscribe for stock and issue bonds in aid of a railroad company, was established by numerous decisions of the highest court of the State ; that there was no distinction in principle between a law *authorizing* a town, upon a popular vote, to subscribe for such stock and issue bonds therefor, and a law *directing* the same thing to be done ; that when the authority to subscribe was made to depend upon the consent of the town, it was in the discretion of the legislature to prescribe how such consent shall be given ; and that if it originally rested with the legislature to fix the terms on which the towns might act, the same power could remit a part of the conditions imposed, or heal any defects which may have occurred in the performance by the town of those conditions. Said the court : "In this case a commissioner has been regularly appointed under the statute, by whom bonds were to be issued and stock subscribed for, provided certain consents were obtained and proofs filed according to the requirements of the several acts upon the subject. Consents were obtained, and proofs were made and filed, which are now on the one side claimed to be, and on the other are denied to be, in conformity to the law. The commissioner

meanwhile executed the bonds subscribed for stock, and delivered the bonds to the company in payment of the subscription ; complying with the requirements of the statute in all respects, if the requisite consents had been given and proof made. The only officer of the town who had any duty in the premises acted by signing the bonds ; and the legislature, seeing the whole matter, released the conditions which it had imposed, and declared his assent binding upon the town, if the bonds had been issued and the road had been built, and the bonds in that case obligatory. As it might have authorized action in this way and on these conditions by the town originally, I see no objections to giving effect to its ratification of the action of the town, and holding its consent thus expressed effectual." Again, said the court : "In this case the proper officer of the town has acted, the bonds have been issued, and the stock subscribed for. The objection is that the proof of preliminary consents by taxpayers is defective. The action of the legislature is, in my judgment, sufficient to heal this defect and to sanction the action of the town commissioner in binding the town, the whole consideration to the town having been received in the completion of the road and the issuing of the stock for its benefit." In the subsequent case of *Williams v. Duanesburgh*, 66 N. Y. 129, the court recognizes the correctness of the principles announced in *People v. Mitchell*, 35 N. Y. 522, and in *Duanesburgh v. Jenkins*, citing among other authorities, *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 253 ; *Thompson v. Lee County*, 3 id. 377 ; *Beloit v. Morgan*, 7 id. 619, and *St. Joseph v. Rogers*, 16 id. 663. Alluding to the statutes for bonding towns in aid of railroads, ALLEN, J., in *Williams v. Duanesburgh*, said that the legislature could overlook the defective execution of the power conferred, and by retroactive legislation cure defects in the action of municipalities under those statutes. "The

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<sup>1</sup> *Treadway v. Schnauber*, 1 Dakota, 236.

validate them by special act,<sup>1</sup> unless, as seems to be the case in Illinois,<sup>2</sup> the constitution is held to strip the legislature of this

legislature may," said he, "by subsequent legislation, when there has been a failure to perform conditions precedent, and the bonds have been issued, dispense with such conditions, and ratify and confirm, and make valid and obligatory upon the municipality, bonds issued without such performance; at least it may do so in cases where the municipality has, through the construction of the road, or by the receipt of the stock of the company in exchange for the bonds, received the benefit which the statute contemplated as the equivalent for the liability it was authorized to incur. The officers authorized under these statutes to issue the bonds are public agents, and the legislature, looking over the whole matter, may, when in its judgment justice requires it, ratify and confirm their acts, which otherwise would be valid. In this case the legislature could originally have authorized the bonds of the town of Duaneburgh to be issued under the precise circumstances existing when they were issued, and if the acts of the commissioner have, by subsequent legislation, been ratified, it is equivalent authority to do what has been done." But in the later case of *Horton v. Thompson*, 71 N. Y. 520, the Court of Appeals decided this statute to be unconstitutional. That action was commenced about the time the Circuit Court of the United States for the Southern District of New York sustained the validity of the confirmatory act of April 28, 1871, and gave judgment against the town of Thompson for the amount of some of the bonds embraced in the issue of \$148,000. *Cooper v. Thompson*, 13 Blatchf. (U. S. C. C.) 434. *Horton v. Thompson* was decided in the Supreme Court of the State after the action of *Cooper v. Thompson*, *ante*,

was instituted. It was a suit upon two interest-coupons of thirty-five dollars each, belonging to the same issue of bonds. It was finally determined in the court of appeals shortly before the trial of the case of *Cooper v. Thompson*, *ante*. The questions raised in the case were whether the consent of the taxpayers was defective in not naming the railroad to the construction of which the fund should be applied; and whether the validating act of April 28, 1871, in so far as it declared the exchange of bonds for stock to be legal, was not unconstitutional. Upon the first question the court said, that as the consent was sufficiently comprehensive in its terms to embrace the road in question, and inasmuch as the legislature might legally have authorized it to be in the form in which it was actually given, the act of 1871 "probably cured the defect in its form." But the court, passing that question as one that need not be finally determined, held upon the authority of *People v. Batchelor*, 53 N. Y. 131, that the legislature had no power to authorize or direct the commissioners originally to contract the debt without any consent or action upon the part of the town; and that since the consent of the taxpayers was not given for an issue of bonds to be exchanged for stock, the legislature could not validate the bonds and make them binding obligations upon the town, in the hands at least of those who were informed, by their recitals, that in violation of the statute they were exchanged for stock in the railroad company. Four of the judges concurred in the opinion, and three dissented. The court does not refer to or overrule *Bank of Rome v. Rome*, 18 N. Y. 38; *People v. Mitchell*, 35 N. Y. 522; *Duaneburgh v. Jenkins*, nor *Williams v. Duane-*

<sup>1</sup> *National Bank v. Yankton County*, 101 U. S. 129. But an act which purports only to cure irregularities, will not validate bonds which were issued *ultra vires*. *Williamson v. Keokuk*, 44 Iowa, 88. Conditions imposed by the enabling act may be waived or changed by the

legislature *even during litigation*. *Duaneburgh v. Jenkins*, 57 N. Y. 177. But see *Columbus, &c. R. R. Co. v. Grant County*, 65 Ind. 427.

<sup>2</sup> *County of Richland v. People*, 3 Brad. (Ill.) 210; *Gaddis v. Richland County*, 92 Ill. 119.



power.<sup>1</sup> Of course the legislature cannot give validity to bonds issued *without authority of law* by a municipal corporation where, after their issue, the constitution prohibits it from conferring authority to issue bonds, except in a manner other and different from that adopted in reference to the issue of the bonds sought to be legalized, — as such an act is equivalent to an original exercise of power, and would operate as a complete abrogation of the constitutional provision; nor can it legalize bonds which were issued prior to the adoption of the constitution, *where the legalizing act operates as a delegation of original authority which is obnoxious to the constitution as existing when the legalizing act was passed*. But where it merely cures defects which arose in an attempt to carry out the provisions of a valid act, the circumstance that, as an original delegation of authority, it would be unconstitutional, does not render the legalizing act ineffectual. Thus, a town in New York was authorized, upon certain

burgh, *ante*. But in *Thompson v. Perrine*, 106 U. S. 589, the town of Thompson, in New York, was authorized by statute to issue bonds in aid of a specified railroad. The statute directed that commissioners should be appointed, who should execute the bonds under their hands and seals; that such bonds should not be binding upon the town without the consent of a specified proportion of the taxpayers, which consent was to be proved by the affidavit of the town clerk; that the bonds should not be sold for less than par, and that the money received for their sale should be invested in the stock of the railroad company. The bonds were issued by commissioners appointed in pursuance of the statute. They were not sold as the statute required, but were exchanged directly with the railroad company for its stock, which fact was recited in the bond. It was claimed that they were defective in other particulars, and that there was not a compliance with the statute requiring consent of taxpayers, etc. The railroad for the aid of which the bonds were issued was built. Thereafter the legislature of New York, by an act passed in 1871, ratified the acts of the commissioners in issuing and exchanging the bonds, and declared that such bonds should not be void or voidable in the hands of *bonâ fide* holders for value, by reason of any defect or omission in the consents, but

should be valid against the town of Thompson. At the time this act was passed it was the established doctrine of the highest court in New York that the legislature had authority to pass such an act. Subsequently to this, the plaintiff purchased, in good faith, for value and without notice, except the recital in the bonds, of any defect, certain of the bonds. In an action against the town on such bonds, it was held that the bonds were enforceable against the town; and that a decision of the New York court of last resort, in a suit commenced after the plaintiff had brought his action (*Horton v. Town of Thompson*, 71 N. Y. 520) that the act in question of 1871 was not constitutional, was not binding upon this court to prejudice the rights of the plaintiff, and also that a judgment in an action to which the plaintiff was not a party, and of which he had no notice, declaring the bonds void, did not bind him.

<sup>1</sup> See also *Horton v. Thompson*, 71 N. Y. 513, to the same effect. But see *Perrine v. Thompson*, 17 Blatchf. (U. S. C. C.) 18, where the doctrine of this case was repudiated, and the decisions of the Supreme Court in *Horton v. Thompson*, 7 Hun (N. Y.), 452, *Rogers v. Smith*, 5 id. 475, and of *Cooper v. Thompson*, 13 Blatchf. (U. S. C. C.) 434, where it was held that the legislature might legalize bonds irregularly issued, were adopted.

conditions, to subscribe for railway stock, and sell its bonds at not less than their par value to raise funds wherewith to pay therefor. The subscription was made; but the commissioners issued to the company, in exchange for its stock, bonds in which that fact was recited. Such an exchange was not authorized by the statutes, and under the decisions of the courts of that State, a holder of the bonds, who had notice that they had been so exchanged, could not enforce the payment of them. But in 1871, the legislature ratified the acts of the commissioner in issuing and exchanging these bonds for stock, and declared that no bonds held or owned by any person, in good faith and for valuable consideration, shall be void by reason of the consents not stating the name of the company, provided the exchange of bonds for stock was made at the par value of the bonds. A. purchased them for value, and brought suit upon certain coupons detached therefrom. It was held that the legislature had the constitutional power to pass the act, and that the bonds were thereby validated.<sup>1</sup>

**SEC. 114. General and special Statute authorizing: Effect of.**—Where, while a general statute is in force providing that towns, etc., may raise not exceeding a certain per cent of their valuation to aid in the construction of railroads, a special act is passed authorizing the issue of a certain specified sum, the two acts will be treated as independent of each other, and as authorizing the raising of both sums, if the town so elects, if neither contains any language showing an intention on the part of the legislature to modify or limit either by the other.<sup>2</sup> Thus, in the case last cited, the legislature by a special act authorized the town of Anson to raise not exceeding \$100,000 in aid of the construction of the Somerset railroad, and there was then in force a general law authorizing any town to raise not exceeding five per cent of its valuation to aid in the construction of railroads. The town, by legal votes at town meetings called for the purpose, March 23, 1868, and Oct. 1, 1870, voted to issue not exceeding \$95,000 in bonds to aid in constructing said road, and \$92,300 were issued thereunder; and by similar votes at meetings called for the purpose, Nov. 21, 1874, and June 10, 1875, it voted to issue \$27,500

<sup>1</sup> *Thompson v. Perrine*, 103 U. S. 806. See also, involving the same question, *Horton v. Thompson*, 7 Hun (N. Y.), 452; *Rogers v. Smith*, 5 id. 475. But *contra*, *Horton v. Thompson*, 71 N. Y. 513. If the legislature had no authority at the

time when the bonds were issued to give authority for their issue in the particular manner in which they were issued, it is held that it cannot afterwards legalize it. *Elmwood v. Morey*, 92 U. S. 289.

<sup>2</sup> *Stevens v. Anson*, 73 Me. 489.

in bonds for the same object, which were accordingly issued. The valuation of the town in 1874 was \$505,290, and in 1875, \$501,476. It was held that these several votes were authorized by said acts, and that the bonds were valid.

SEC. 115. **Issuing Bonds instead of paying Money.** — Where a municipal corporation was empowered to take stock in a railroad company, and the latter received the bonds of the corporation as cash, in payment of the subscription, instead of requiring the city to raise the money upon them, it was held that the transaction was lawful, and not beyond the corporate powers of either the city or the railroad company.<sup>1</sup> The power to subscribe gives by necessary implication the right to issue notes, bonds, or other proper securities therefor.<sup>2</sup> And after the bonds or notes have been issued, the liability of the corporation to pay them cannot be defeated by a repeal of the act under which they were issued, as they then become a contract between the holders and the municipality, which the legislature cannot impugn; and the corporation may be compelled by mandamus to raise a tax for their payment.<sup>3</sup>

SEC. 116. **Sale below Par.** — Where an act authorized a corporation to take stock in a public enterprise to a certain amount, and the only means provided for raising the money, was by issuing bonds, and the amount of the bonds to be issued was restricted to the amount of the stock to be taken, it was held that these bonds could not be sold for less than par.<sup>4</sup> If sold below par, in violation of the statute, *the municipality by proceedings in equity may compel the holder to receive in satisfaction of the bonds the sum paid by the first purchaser with interest.*<sup>5</sup> The bonds are not in such case invalidated, nor can the corporation defend against an action at law to recover them upon that ground; but, as previously stated, a court of equity will give relief to the extent of the difference between the sum paid therefor and the par value of the bonds.

SEC. 117. **What constitutes a Subscription.** — It is not necessary, in order to constitute a binding subscription by a municipal

<sup>1</sup> *Evansville, &c. R. R. Co. v. City of Evansville*, 15 Ind. 395; *Meyer v. City of Muscatine*, 1 Wall. (U. S.) 384; *Curtis v. County of Butler*, 24 How. (U. S.) 435; *Commonwealth v. Councils of Pittsburgh*, 41 Penn. St. 278. *Contra*, see *Statin v. Town of Genoa*, 23 N. Y. 489.

<sup>2</sup> *Louisville, &c. R. R. Co. v. Nicholl*, 9 Humph. (Tenn.) 252.

<sup>3</sup> *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 435; *St. Joseph, &c. R. R. Co. v. Buchanan County*, 39 Mo. 485; *People v. Tazewell County*, 22 Ill. 147.

<sup>4</sup> *Neuse River Navigation Co. v. Commissioners of Newbern*, 7 Jones (N. C.), L. 275.

<sup>5</sup> *County of Armstrong v. Brinton*, 47 Penn. St. 357.

corporation to the stock of a railroad company, that there should be an actual manual subscription upon the books of the company. *If the corporation, by the mode directed in the statute, directs its officers to subscribe for a certain amount of such stock, without conditions, and there has been an actual or constructive acceptance by the corporation in whose favor the aid is granted, there is a sufficient subscription within the meaning of the statute, and the right of the corporation to have the bonds issued to it is complete.*<sup>1</sup> But the vote of the inhabitants or taxpayers of a municipal corporation under an enabling act does not vest in the railroad corporation a right to have such subscription made, where the act at the same time vests in the officers of such town, city, or county, any discretion in reference to the matter. Thus, where the statute provided that a certain county "shall have power *by resolution* to cause to be issued bonds . . . to an amount not exceeding \$50,000, if a majority of the ballots cast" by the legal voters in said county be for railroad aid, it was held that although a majority of the county voted for such aid, yet, it still rested in the discretion of the board of supervisors whether such bonds should be issued.<sup>2</sup> Nor does a vote or order of a county court directing a subscription to be made upon certain contingencies, or conditions named in the vote or order, amount to a subscription.<sup>3</sup>

<sup>1</sup> *Nugent v. Supervisors*, 19 Wall. (U. S.) 241; *State v. Jennings*, 4 Wis. 549. Where the county court has made an order to subscribe to the capital stock of a railroad company for the use of one of its branches, and issued county bonds which were accepted by the construction committee in payment, it was held that an actual manual subscription on the books of the company was unnecessary to entitle it to the stock, or to bind it as a subscriber. *Cass County v. Gillett*, 100 U. S. 585.

<sup>2</sup> *Wadsworth v. St. Croix County*, 4 Fed. Rep. 378 (U. S. C. C.).

<sup>3</sup> *Cumberland, &c. R. R. Co. v. Barren County Court*, 10 Bush (Ky.), 604. In *Bates County v. Winters*, 97 U. S. 83, a proposed subscription to a railroad having been approved at an election duly held, the county court legally and regularly, in the name and behalf of the town, made an order that a certain sum "be and is hereby subscribed" to the capital stock of a certain railroad, subject to all the terms

and restrictions of the order of the court, and that the agent be authorized and directed to make such subscription on the books of the company, *and in making it to have copied in full the order of the court*, as the condition on which the subscription is made, and that he report his action to the court. The agent finding that the company had no books, and being otherwise dissatisfied with the state of their affairs, made his report, ending it with these words, "*the bonds of said township are therefore not subscribed.*" Subsequently, without any new vote on the part of the citizens, the county court made an order reciting *that the subscription had been made to said railroad*, and directed that, as said company had been consolidated with another under a new name, the bonds be issued to the new company, which order was duly executed. It was held that the first order of the court was not self-executing, and that there had been no subscription to said railroad, and that the issue of the bonds

*So long as any condition is unsettled, or any discretionary act remains to be done, the vote or order does not become operative; but when the vote or order merely leaves the officers to perform a simple ministerial or clerical duty, it is operative, and the performance of such duties may be compelled. Where the subscription is voted upon certain conditions first to be performed, or the officers of the corporation are to do certain acts to effectuate it, — until such acts are done there is no subscription, and the vote of the corporation goes for nothing.*<sup>1</sup>

**SEC. 118. Relation of municipal Corporations as Stockholders.** — Municipal corporations, which become stockholders in a railroad corporation by reason of a subscription to the stock thereof, in payment of which they issue their bonds, stand in the same relation to the company and to the public as any other stockholder; and if they discharge their debt to the corporation for the stock by paying for it less than the full amount, they still remain liable to pay the difference between the sum which it actually paid, and the amount of the indebtedness, unless the payment was made by way of compromise, where there was a reasonable doubt as to their liability.<sup>2</sup> Thus, a county which had issued bonds in aid of a railroad company, and delivered them in payment of stock, after the railroad company had suspended operations, and was notoriously insolvent, and a decree of foreclosure had been rendered against it, by arrangements with certain creditors of the company, — which were consummated under the cover of suits in a State court by such creditors against the company and the county, to the prejudice of other creditors, — attempted to discharge its liability to the common debtor, the company, by paying less than the entire sum due from it. By these arrangements the county got possession of the bonds. It was held that the liability of the county was not discharged, the court saying: "Upon recognized principles of public policy and good faith, the debt which the county owed, by reason of its subscription and the bonds given therefor, constituted, with other property of the insolvent company, a trust fund, to which all its creditors could rightfully look for satisfaction of their claims. The county was liable for the whole of that debt, and by no device or combination to which particular creditors were

under the second order was unauthorized, and the bonds could not be enforced, even in the hands of a *bona fide* holder.

<sup>1</sup> *People v. Pueblo County*, 2 Cal. 360; *Cumberland, &c. R. R. Co. v. Barren County*, 10 Bush (Ky.), 604.

<sup>2</sup> Where there is a conflict between the State and the United States courts as to the validity of bonds, they may be compromised, as that creates a reasonable doubt as to the liability of the town, etc. *State v. Holladay*, 72 Mo. 499.

parties could it withdraw its bonds from that fund, and thereby avoid liability to the general creditors of the company.”<sup>1</sup> In another, earlier, case<sup>2</sup> the same court had occasion to consider the question whether the creditors of an insolvent corporation were at liberty to assail a transaction between it and one of its debtors, whereby the latter’s subscription of stock was withdrawn, so far as general creditors were concerned, from the assets of the corporation. In that case the court declared the doctrine to be well established that the capital stock of a corporation, especially its unpaid subscriptions, constituted a trust fund, for the benefit of the general creditors of the corporation, and that the governing officers of a corporation could not, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing, and for a valuable consideration. In a later case,<sup>3</sup> the court said: “The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demand, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bond fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation.”<sup>4</sup>

**SEC. 119. Conditional Subscriptions and Bonds.**—A municipal corporation may prescribe any condition to its subscription which an individual might make, unless the statute expressly or impliedly takes away the right, and may make its subscription payable, upon

<sup>1</sup> County of Morgan v. Allen, 103 U. S. 498.

<sup>2</sup> Sawyer v. Hoag, 17 Wall. (U. S.) 621.

<sup>3</sup> Sawyer v. Upton, 91 U. S. 60.

<sup>4</sup> Upton v. Trebilcock, 91 U. S. 45; Webster v. Upton, id. 65; Hatch v. Dana, 100 id. 210; Morgan Co. v. Thomas, 76 Ill. 141.

performance thereof.<sup>1</sup> And there is no doubt but that a municipal corporation is entitled to the benefit of the same implied conditions arising from the acts of incorporation of the company, or its contract of subscription, that an individual subscriber would be entitled to. Thus, where the articles of incorporation of a railroad company stated its object to be to acquire, maintain, and operate a railroad through certain designated points, of which the town of N. was one, it was held that the construction of the road to N. was essential to entitle the company to the tax voted in its aid in that township; and that the building of the road to a point without the township, and the purchase of another line of road from such point to the town, would not authorize the collection of the tax, the construction of a road being the only object for which such tax can be legally voted or expended under the statute. It was also held that the certificate of the township trustees, that a company is entitled to receive the tax, is not authority for its collection, the only object of such certificate being to authorize the treasurer to pay to the company the amount collected and in his hands.<sup>2</sup>

Where a town or other municipal corporation contracts to issue its bonds to a railroad company upon the performance of certain conditions, as that it should construct its road *from* a certain point to a certain other point within a certain time, *if the company does not perform the condition within the time*, it cannot, although prevented by rains and floods, compel the issue of the bonds, *although it afterwards completes the line*.<sup>3</sup>

Where bonds are issued with conditions appearing upon their face, all persons taking them are bound by them; and if they were such as the municipality had a right to make, they are binding

<sup>1</sup> Brocaw v. Gibson County, 73 Ind. 543.

<sup>2</sup> Lamb v. Anderson, 54 Iowa, 100. A township voted a subscription to the stock of a certain railroad corporation, payable in bonds at the rate of \$4,000 for each mile of track laid from the east line of the township "to and into" the city of K. It was held that the issue should be made upon the basis of main line and side track built to and within said city. Atchison, Colorado, &c. R. R. Co. v. Phillips County Commissioners, 25 Kan. 261. Upon a county subscription in aid of a railroad, orders and swamp-land patents issued, reciting one of the statutes

authorizing the same, — held to be valid, although not reciting another act in that regard, or showing that a condition therein imposed, as to a petition of a majority of the voters, had been complied with. Chouteau v. Allen, 70 Mo. 290. In State v. Dallas County, 72 Mo. 329, it was held that the act of March 23, 1861, took from the county courts the power given them by the charter of the Laclède & Fort Scott R. R. Co. to make subscriptions to its stock without first submitting the question to a popular vote; but HUGH and NAPTON, JJ., dissented from this view.

<sup>3</sup> Memphis, &c. R. R. Co. v. Thompson, 24 Kan. 170.

even though they are impossible of fulfilment because of a constitutional provision preventing performance. Thus, in an Illinois case,<sup>1</sup> a city was empowered to issue bonds as a donation to a railroad company, to secure the location of its machine-shops in the city. Bonds were issued, conditioned that they should be paid out of money to be raised by a special tax upon property in a certain section of the city. Under the constitution of the State the tax could not be so raised, and it was held that as the city had a right to impose the condition, and as it could not be complied with, payment of the bonds could not be enforced.<sup>2</sup>

A company authorized to construct a railway through Wisconsin from the Illinois line to intersect another road west of Monroe, made a proposition to the plaintiff town, stating that it had surveyed and located a line through certain sections in that town to a point designated in the village of Platteville, and proposed to build the road "on the route indicated," from Galena to the Wisconsin river; and it asked aid of the town to build the road "on the route indicated." The town accepted the proposition and issued its bonds. It was held, that while the proposition did not disclose a survey and location of the line northward beyond the point designated, yet it bound the company to build a continuous line of road from Galena, over the surveyed line described in the proposition, to the point designated, and *from that point* to the Wisconsin river.

A feeble company, of doubtful ability to construct any road between the terminal points of its charter, will be restrained, at the suit of a municipality which has subscribed for stock and issued bonds in aid of its proposed main line, from wasting its means in constructing branch roads so as to disable it to build its main line; and where a pretended branch is such that its completion will be a complete user of the company's original franchise, and will give it a continuous road between the termini originally named, but not passing through or near the plaintiff municipality as did the main line proposed, and there is no apparent design to continue the road on such main line, the construction of the pretended branch will be

<sup>1</sup> Chicago, &c. R. R. Co. v. Aurora, 99 Ill. 205.

<sup>2</sup> In Louisiana a special statute authorized a town to issue bonds. The Revised Statutes prohibited towns from contracting debts without providing means with

which to pay, and it was held that the town was liable on its bonds only to the extent of the provision made for their payment. Oubre v. Donaldsonville, 33 La. An. 366.



restrained, as a "diversion" of the road from such municipality within the meaning of the statute.<sup>1</sup>

The M., M., and G. B. R. R. Co. was authorized by its charter to build a railway from Milwaukee northerly *via* the cities of Sheboygan and Manitowoc to Green Bay, with power to change and relocate its road "so as not materially to change the route," and to connect its line with any other road; and any company having a road built, or partly built, running in the direction of the line above described, was authorized to lease or sell any part of its road to said first mentioned company. After the defendant town had subscribed to the stock of said M., M., and G. B. Co., the latter, without the consent of the town, acquired the franchises of another company, pertaining to a line of railway from Manitowoc to Appleton, about forty miles in length and running nearly at right angles with the line first above described; and this road the M., M., and G. B. Co. proposed to construct and operate. It was held that this was such a fundamental change in the character of the enterprise contemplated by that company as to release non-assenting subscribers from payment of their stock subscribed before the company had acquired, or was authorized by law to acquire, such additional line of road.<sup>2</sup>

Under an act authorizing cities to issue bonds to pay subscriptions towards the stock of railroads, the proceeds of the bonds to be in all cases expended within the limits of the county in which the city is situated, a city issued and delivered its bonds to a railroad company upon its guaranty that their proceeds should be so expended. No part of such proceeds was, however, so expended. A. claimed to have become the owner of these bonds under a foreclosure sale under a mortgage of the property of the railroad. It was held, that he could not recover from the city.<sup>3</sup>

Municipal bonds, having on their face many years to run, but issued and put in circulation with an indorsement upon each of them, to the effect that, in case default be made in paying any of the inter-

<sup>1</sup> *Platteville v. Galena & Southern Wisconsin R. R. Co.*, 43 Wis. 493.

<sup>2</sup> *Noesen v. Port Washington*, 37 Wis. 168; *Perkins v. Port Washington*, 37 id. 177. Where the location of a railway is a condition precedent to the right to issue bonds in its aid, and the location is not made as required, the bonds are invalid, even in the hands of a *bond fide* holder. *Mellen v. Town of Lansing*, 19 Blatchf.

(U. S. C. C.) 512. It is competent for a railway company, in submitting a proposition for aid, to define therein, as a part of the proposition, the line of the proposed road. *Town of Platteville v. Galena & Southern Wisconsin R. R. Co.*, 43 Wis. 493.

<sup>3</sup> *Foots v. Mount Pleasant*, 1 McCrary (U. S. C. C.), 101.

est coupons at maturity, then, as a part of the contract, the bond itself shall become due and payable, are legally due, as to the whole of the principal, whenever a default in paying interest according to any of the coupons occurs. Time is of the essence of the contract.<sup>1</sup>

Provisions of an act requiring that the vote of a town shall be based on a written proposition from the company, defining the amount and kind of stock to be subscribed for, the mode and times of payment, the kind of security given, etc., and which may contain stipulations as to the location of the road, depot grounds, etc., in said town, were held to be valid and salutary. A stipulation that the company should connect its road by a side track in the town of M., and would not connect its road within three miles of the town of M. with any other railway so as to permit the passage of cars from one road to the other, — except in a certain locality, — without the consent of the town, was held to be valid, and not contrary to public policy.<sup>2</sup> So where a town subscribed for stock upon condition that the road “shall be built through the town on the line as run by the engineer, with a suitable depot for the convenience of the public,” it was held that this was a condition subsequent, and will not defeat the right to collect the assessments before the performance of the contract.<sup>3</sup>

A town authorized the issue of its bonds to the relator, in exchange for his stock, upon certain specified conditions. Three commissioners were appointed, and two of them made a subscription for relator's stock, absolute in form, but upon the representation of relator, and their belief that they could not be compelled to deliver the bonds of the town until they could make an agreement with the relator, in pursuance of the statute. The relator did not perform the conditions upon which the bonds were to be issued to it; and it was held that the commissioners were not estopped by their subscription, and that relator was not entitled to a peremptory *mandamus* for the delivery of the bonds.<sup>4</sup> In another case a town, by a two-thirds vote, issued bonds in aid of a railway, on condition that by a given time the road should be completed to C., and the cars running and transporting freight and passengers over the road from M. to C.; and it was held that the road must be completed within the specified time,

<sup>1</sup> Mayor, &c. of Griffin v. City Bank of Macon, 58 Ga. 584.

<sup>2</sup> Lawson v. Milwaukee, &c. R. R. Co., 30 Wis. 597.

<sup>3</sup> Belfast & Moosehead Lake R. R. Co. v. Brooks, 60 Me. 568.

<sup>4</sup> People v. Hitchcock, 2 N. Y. Sup. Ct. 134.

before the aid could be demanded;<sup>1</sup> and a subsequent majority vote could not modify the conditions in the original vote, the statute requiring a two-thirds vote.

Where a county has power to issue bonds upon certain conditions, and the bonds have been issued and are in the hands of *bonâ fide* holders, the holder is not bound to allege, in his declaration, the facts showing a compliance with the conditions on which the issue of the bonds is authorized.<sup>2</sup> The condition must be clearly expressed

<sup>1</sup> Portland, &c. R. R. Co. v. Inhabitants of Hartford, 58 Me. 23.

<sup>2</sup> Railroad Co. v. Otoe County, 1 Dill. (U. S. C. C.) 338. Where the issuing of corporate bonds to a railway company is dependent upon the condition that its road shall be completed to a certain city within a given time, a completion of its road to about a mile from the city, and, by an arrangement with another road which it intersects, the running of its trains to the city over the other road as fully accommodates the public as if its own line had been extended into the city, will be regarded a substantial compliance with the condition, — especially where the evidence shows that the formal completion of the road in precise conformity to the terms of the subscription had been delayed beyond the contract time by the refusal of the town to give the promised bonds. People v. Holden, 82 Ill. 93. In another case a town subscription to a railroad recited that one P. had contracted to construct the road within the following year, and provided that if the company should "fail to construct the road," it would refund to the town certain money, with interest. And it was held that the company was bound to construct the road the following year, or refund, etc.; and that in such case a surrender of the stock is a sufficient consideration for the undertaking of the company, without regard to the recitals of matters of inducement. Chicago, &c. R. R. Co. v. Marseilles, 84 Ill. 145. In an Iowa case the engagement of a subscription in aid of a railroad was to the effect that the signer would give to the company a sum named, if the railway should be constructed, and a train running to "within one mile of Elkport post-office" at a time specified. The

road was built at the time named in the contract, and the depot located within one mile of the post-office, and on the day specified a passenger train ran to a point within two hundred yards of the depot. It was held that the money was collectible. Chicago, &c. R. R. Co. v. Schewe, 45 Iowa, 79. In a Maine case subscription to the capital stock of a railroad company was made upon condition that the road "be located through the town of Brewer, satisfactory to the selectmen of said town." It was held that such location was a condition precedent which must be complied with before a recovery could be had against the town for the sum subscribed. For the company, in an action for the amount subscribed, to allege and prove that the road was located wisely, prudently, and judiciously for the interests of the town, is not sufficient, without showing that the location was satisfactory to the selectmen. Bucksport, &c. R. R. Co. v. Brewer, 67 Me. 295. A condition imposed in a municipal subscription, that the company shall "fully construct, equip, and put into successful operation" its railway into the city before receiving the bonds, *does not necessarily require that the company shall build a railroad bridge across a stream which intervenes on the route*; but is satisfied if the company provides such facilities for passing the river as, at the time of making the contract, were usual and customary, under like circumstances, in railroad transportation across the stream, and are adequate and reasonably convenient with reference to such mode of transit. Hodgman v. St. Paul, &c. Railw. Co., 23 Minn. 153. Completing its road to a connection with another road running to the city of M., and contracting for the use of that road, and by means of it running

in order to be operative. Thus, the proposition to subscribe to the capital stock provided that the money thus voted "should be expended only in the event of the railroad being constructed and running centrally through the said county;" it was claimed that the construction of the road as provided in the condition was a condition precedent to the issuing of the bonds. It was held that the clause was ambiguous and admitted of doubt as to whether the word "constructed" did not belong to the word "centrally," as the word "running" did, making it mean, "constructed, and running centrally;" that the county judge had placed a construction on this ambiguity, by issuing the bonds; and that when the bonds had been issued, a purchaser was warranted in presuming that the road had been built to the acceptance of the county.<sup>1</sup>

Where the statute imposes a condition, as between the town, etc., and the railroad company, a failure to perform the condition will be a defence; but as against a *bond fide* holder, it will not be, if the bonds are regular on their face. Thus where an act authorizing certain counties to issue bonds in aid of a railway company provided that the bonds, when regular upon their face, should be deemed conclusive evidence of the regularity of all preliminary proceedings, in the hands of a *bond fide* holder, it was held that where bonds, regular on their face, were issued and delivered to a railroad company, ostensibly in payment of a subscription of stock, and have passed into the hands of a *bond fide* holder, they must, as to such holder, be regarded as issued and negotiated within the meaning of the act. Fraud as between the railroad company and county commissioners cannot be pleaded against such holder.<sup>2</sup> In an earlier case in the same State, an act of the general assembly provided that the county commissioners of any county through or in which a railway might be located

trains regularly to and from the city of M., may be a substantial compliance with a condition in a subscription that the company shall first complete its road to the city of M., and may entitle the company to claim the bonds subscribed under such condition. *State v. Town of Clark*, 23 Minn. 422. See also *State v. Lime*, 23 id. 521. In New York, towns could (under Laws 1871, ch. 925) impose as a condition precedent to subscribing for railroad stock and issuing bonds, that the road should be located and constructed through the town; and if they did so the commis-

sioners could not accept any agreement of the company, or other substitute, in lieu of full compliance. *Falconer v. Buffalo, &c. R. R. Co.*, 69 N. Y. 491. An act authorizing a town to give its bonds in aid of the M. railroad and the E. railroad, enables the town to give its bonds in favor of either railroad separately. *First National Bank of St. Johnsbury v. Concord*, 50 Vt. 257.

<sup>1</sup> *Clapp v. Cedar County*, 5 Iowa, 15.

<sup>2</sup> *State v. Hancock Co.*, 12 Ohio St. 596.

by a railway company, should be authorized to subscribe to the capital stock of the company, and issue negotiable bonds in payment of such subscription. An alternative *mandamus* was awarded to require the commissioners to levy a tax to pay bonds purporting on their face to have been issued in payment of such a subscription, and to be payable to bearer, and which were stated to be held by the relator as a *bond fide* holder. The answer to the writ stated that the road had never been located through or in the county. It was held on demurrer to be a sufficient defence, as showing that the bonds had been issued illegally and without authority of law. The act provided that bonds issued and negotiated by the commissioners, and regular on their face, should, in the hands of the company, or of any *bond fide* holder, be deemed and taken in all courts and elsewhere as conclusive evidence of the regularity of everything required by the act to be done preliminary to the issuing and negotiation of such bonds. It was held that to make bonds regular on their face such conclusive evidence, and an estoppel to a defence showing a want of power in the commissioners, there must be an averment that they had been "issued and negotiated by the commissioners."<sup>1</sup>

**SEC. 120. Municipality estopped from Denying that Condition is performed, when.**—If the people of a county or other municipal corporation vote a subscription in aid of a railway company, to be paid in bonds of the county upon certain conditions precedent, the county or other authorities cannot delegate power to others to determine when the conditions are performed, but must determine that fact themselves, as the authorized agents of the people. This is an official trust, which cannot be delegated.<sup>2</sup> And when they decide that the conditions have been performed and deliver the bonds, the corporation is estopped from setting up the breach of such conditions to defeat the bonds.

Thus, a county in Illinois, a subscriber to the stock of a railway company, agreed to extend the time for completing the road from that originally fixed to a particular date. Before that date the county, by its proper officers, declared the road completed to its satisfaction, delivered its bonds, and received the stock of the company in return therefor. It was held that its action constitutes

<sup>1</sup> *State v. Hancock County*, 11 Ohio St. 183.

<sup>2</sup> *Jackson County v. Brush*, 77 Ill. 59.

a waiver and an estoppel which prevent it from raising the objection that the contract was not performed in time.<sup>1</sup>

**SEC. 121. Surveys, what amounts to.**—When the statute provides that a municipal corporation may subscribe to the stock of a railroad which has been “surveyed,” it is not essential to the validity of the popular election, ordered and held on the question of subscription to the stock, that there should have been a final and definite survey and location of the entire line of the company’s road. All that is required is a substantial location, designating the termini and general direction of the road, and an estimate of the cost of constructing it.<sup>2</sup>

**SEC. 122. Substitution of Bonds, when may be made: general Powers.**—When a municipal corporation has issued a single bond for the full amount of its subscription, it may afterwards lawfully issue bonds for smaller sums in lieu of the single bond, as in such a case the change does not alter the indebtedness, but only changes the evidences thereof.<sup>3</sup> And where it is authorized to issue bonds subject only to a restriction as to the amount, it may issue bonds in payment of those previously issued and which are overdue.<sup>4</sup> Where a municipal corporation is authorized to exact a bond, mort-

<sup>1</sup> County of Randolph v. Post, 93 U. S. 502.

<sup>2</sup> County of Wilson v. National Bank, 103 U. S. 770.

<sup>3</sup> Com. v. Allegheny County, 37 Penn. St. 237. Bonds were issued by a county, under an act of the legislature, making it obligatory on the county to levy an annual tax sufficient to pay the interest on the bonds as it accrued, and the principal at maturity. Afterwards the county proposed to the holders of such bonds that, if they would scale them twenty-five per cent, and take new bonds for the reduced sum, the county would annually levy and collect a sufficient tax to pay the interest on the new bonds as it accrued, and the principal at maturity; and that if it failed to do so, the holders of the new bonds should be restored to all their rights under the old bonds. New bonds were issued under this agreement, but the county failed to pay the interest thereon; and as a tax could not be levied therefor, it was held that an action at law would lie thereon, but that a bill in equity not seeking a discovery could not be maintained. Merchants’ Bank v.

Pulaski County, 1 McCrary (U. S. C. C.), 316; Gause v. Clarksville, 5 Dill. (U. S. C. C.) 165. Where bonds which were illegally issued are exchanged for those which are legal, the latter may be enforced by the holder. Merchants’ Bank v. Little Rock, 5 Dill. (U. S. C. C.) 265. In McKee v. Vernon County, 3 Dill. (U. S. C. C.) 210, the agent of the county and the presiding justice of the county court substituted engraved bonds, the signatures on the coupons of which were lithographed, for private bonds, the new bonds being of the same date and amount as the old, and the old being at the same time destroyed; there was no order of the county court for the substitution, but the county afterwards paid interest for two years, retained the certificate of stock which was the consideration of the bonds, and entered of record other reasons than the substitution for ceasing to pay interest on the new bonds. It was held that the plea of *non est factum* was not sustainable as a defence to an action to recover coupons on the new bonds.

<sup>4</sup> Quincy v. Warfield, 25 Ill. 317.

gage, or other security that the money received for the bonds shall be employed in building the railroad, it is a mere privilege, which it may waive; and its failure to exact such security does not affect the validity of the bonds;<sup>1</sup> and express authority to insert in the ordinance certain specified provisions does not necessarily operate as an inhibition to the insertion of such other clauses and conditions as may be deemed advisable or proper,<sup>2</sup> unless from the general tenor of the act, it is evident that such inhibition was intended. Where the statute designates what officers shall make the subscription, they alone can make it, and if a certain board of officers is named to fix the *amount* of the subscription, the amount must be definitely fixed by them before a valid subscription can be made. Therefore, where a board endowed with such powers recommended a subscription "not exceeding" a certain sum, it was held insufficient to justify a subscription, because they thereby undertook to delegate their powers, which they had no authority to do.<sup>3</sup>

The authority to levy and collect the tax is not invalidated, nor is the obligation to pay it destroyed, because the statute provides that, with the assent of the city, the citizens who shall actually pay the tax by which her debt for the stock is to be discharged, are to receive from the city the stock itself for which they shall have paid. The validity of the tax, and the obligation of the city to pay it, depend upon the right of the government to contract the debt or duty, and to discharge it by taxation, and cannot be affected by the disposition which is made of that for which the debt was contracted.<sup>4</sup>

**SEC. 123. Effect of Consolidation.** — The circumstance that the corporation in whose favor a municipal corporation has voted to issue its bonds, consolidates with another similar corporation, — the authority to do so existing before the vote was taken, — does not destroy the validity of the vote, and the bonds may lawfully be issued to the consolidated company;<sup>5</sup> and even the sale of the road

<sup>1</sup> *Sinking Fund Commissioners v. Northern Bank*, 1 Met. (Ky.) 174.

<sup>2</sup> *Vicksburgh v. Ouchita*, 11 La. An. 649.

<sup>3</sup> *Mercer County v. Pittsburgh & Erie R. R. Co.*, 27 Penn. St. 389; *Wautumpka v. Winter*, 29 Ala. 651.

<sup>4</sup> *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *Slack v. Maysville & Lexington R. R. Co.*, 13 id. 9.

<sup>5</sup> *Menasha v. Hazard*, 102 U. S. 81; *New Buffalo v. Iron Co.*, 105 id. 73; *Mt.*

*Vernon v. Hovey*, 52 Ind. 563. A county, having lawful authority, issued its bonds in payment of its subscription to a railroad company. Between the latter and another company a consolidation was about to take place, upon condition that the county court would, on an extension of time being granted, levy and collect a tax sufficient to pay the amount due on the bonds. The county court accepted the proposition, and gave the requisite assurance. The consolidation thereupon took place. It

before its completion, by the corporation in whose favor the tax was voted, with a reservation that the purchaser shall complete the road-bed and collect the tax, will not defeat its right to the tax, after the road is completed;<sup>1</sup> and if it appears that the new company is substantially the same as the old one, the corporation may vote to issue the bonds to the new company.<sup>2</sup> But where the corporation is essentially different from that designated by the vote or petition, as, where it has a different name and route or terminus, the subscription is void.<sup>3</sup> In the case last cited, a majority of the taxpayers of Leicester signed a petition praying for permission to subscribe for \$40,000 of the stock of The Northern Extension Railroad Co. The petition contained a condition that the bonds should not be issued until so much of the road running through the town of Leicester and connecting the Village of Mount Morris with the Central Railroad in the town of Caledonia should be completed. The petition was presented to the judge of the County of Livingston, and commissioners were appointed by him to carry the prayer of the petition into effect. After the commissioners were appointed, the Northern Extension Railroad Co. consolidated with two other railroad companies, under the name of The Rochester, Nunda, and Pennsylvania Railroad Co., having different routes and termini from those contemplated by the former company. The commissioners appointed by the county judge refuse to subscribe for stock or issue bonds, on the grounds, among others, that the company in which the petitioners authorized a subscription for stock no longer exists, and that they were not authorized to subscribe for stock in the new company. This action was brought to compel them to make the subscription. But the court refused the relief demanded, MULLIN, P. J., saying:—

was held that the county was estopped from denying the validity of the bonds in the hands of a *bond fide* holder, to whom they were transferred for value by the consolidated company. *County of Tipton v. Locomotive Works*, 103 U. S. 523. See also *County of Scotland v. Thomas*, 94 U. S. 682; *County of Henry v. Nicolay*, 95 U. S. 619; *Menasha v. Hazard*, 102 U. S. 81. In order to invalidate a subscription by a town, etc., the consolidation must work such a fundamental change in the purpose of the corporation as would operate to release individual subscribers to

the stock. *Lynch v. Eastern, &c. R. R. Co.*, 57 Wis. 430.

<sup>1</sup> *Muscatine, &c. R. R. Co. v. Horton*, 38 Iowa, 33.

<sup>2</sup> *Society for Savings v. New London*, 29 Conn. 174; *Com. v. Pittsburgh*, 41 Penn. St. 278; *Empire v. Darlington*, 101 U. S. 87; *Lewis v. Clarendon*, 5 Dill. (U. S. C. C.) 329; *East Lincoln v. Davenport*, 94 U. S. 801; *Illinois Midland R. R. Co. v. Barnett*, 85 Ill. 313.

<sup>3</sup> *Rochester, &c. R. R. Co. v. Cuyler*, 7 Lans. (N. Y.) 431.



"The commissioners have no authority to bind the taxpayers of their town, except such as is derived from the petition, and the statute that authorized it to be signed and presented to the county judge. The power thus given is to subscribe for the stock or bonds of a railroad company named in the petition, and to an amount specifically designated. A subscription in a different company or for a larger amount is simply void. The taxpayers are presumed to have informed themselves of the feasibility of the route over which the road for whose stock or bonds they are desired to subscribe is to be laid, the business that it will probably obtain, the character of the directors, and the benefits, pecuniary or others, that will result from the investment. It cannot be known that consent would have been given to the subscription for stock or bonds in a company located upon a different line, or with different directors, or having different termini. To permit the commissioners to subscribe for stock or bonds in a different company, other than the one designated in the petition, is to disregard wholly the wishes of the taxpayers, and to bind them by a contract into which they never intended to enter. No subscription having been made in behalf of the town of Leicester before the consolidation, of the companies which form the new or consolidated company, it is not bound by the agreement of consolidation or affected by the laws passed to confirm and enforce it. Upon no principle can the commissioners be compelled to subscribe for stock or bonds in the new company."

**SEC. 124. Change in Constitution, etc., after passage of enabling act.**

— Where, after the legislature has passed an act authorizing a municipal corporation to subscribe for stock in a railroad company, *and after the corporation has voted to subscribe*, but before the subscription has actually been made, a change in the constitution of the State is made which prohibits such subscription, the change does not affect the right of the corporation to make the subscription and issue its bonds after such constitutional provision goes into effect.<sup>1</sup>

<sup>1</sup> *People v. Logan County*, 63 Ill. 374. In *County of Clay v. Society for Savings*, 104 U. S. 579, the County of Clay issued two series of bonds, one dated Nov. 1, 1869, in payment of its subscription to the stock of the Illinois Southeastern Ry. Co., and another dated Jan. 4, 1871, whereby its donation voted before the year 1870 to that company was paid; and it was held that the bonds were valid, as

they were issued in strict conformity to the conditions and requirements prescribed by statute, and pursuant to a popular vote cast at an election lawfully held before the year 1870; and that the constitution of Illinois, which took effect during that year, did not attempt to impair the obligation of any prior contract in regard to them, nor prohibit the issue of such bonds as were necessary to give effect to a dona-

Such constitutional provisions are wholly *prospective*, and have no effect upon previous legislation relating to matters under which rights have already become vested.<sup>1</sup> And unless the statute still leaves it discretionary with the municipal officers whether to make the subscription or not, the right of the railroad company to have the subscription made becomes complete upon its legal adoption by the popular vote, and no constitutional or other change can divest them of this right.<sup>2</sup>

A precinct at a meeting held in Oct. 1875, voted bonds to aid in an extension of a certain railway. The bonds were to be placed in the hands of a trustee until the company had so far completed its road as to be entitled to them. The company immediately made a preliminary survey of its line, and it was completed prior to Nov. 1, 1875. It was held that the right of the company to the bonds in question had become vested, at the time the constitution of 1875 took effect, to such an extent that the company could require the bonds to be issued as provided in the proposition, and placed in the hands of the trustee to await the final action of the company.<sup>3</sup>

In another case it was held that the powers of a railroad company in Missouri, in existence prior to the adoption of the constitutional provision of 1865, prohibiting subscriptions to the stock of any corporation by counties, cities, or towns, unless two-thirds of the qualified electors thereof shall assent, were not affected by such provision,

tion so voted. But see *Wadsworth v. Supervisors*, 102 U. S. 534, and *Railroad Company v. Falconer*, 103 U. S. 821, where it was held that a popular vote does not give a vested right in a subscription to a railroad company; and that a change in the State constitution forbidding such subscription will render the vote unavailing if the subscription is not actually made prior to the constitutional change. But, while we would not attempt to question the action of this court, it is evident that the doctrine of these cases is unsound, except where the officers of the corporation are vested with a discretion whether to issue the bonds or not, after the vote has been taken. To give it any other application would place it within the power of municipal officers to defeat the will of the people, when the legislature never intended them to have such power, and would overthrow the doctrine of that long line of almost uniform decisions which have held

that the courts may, by *mandamus*, compel these officers to subscribe, when the people have so voted, upon the ground that their duties relative to the issue of such bonds are only ministerial.

<sup>1</sup> *Supervisors v. Galbraith*, 99 U. S. 214; *County of Henry v. Nicolay*, 95 id. 619; *County of Cass v. Gillett*, 100 id. 185; *Nicolay v. St. Clair County*, 3 Dill. (U. S. C. C.) 163; *Calaway County v. Foster*, 103 U. S. 567; *Huidekoper v. Dallas County*, 3 Dill. (U. S. C. C.) 171; *County of Macon v. Shores*, 97 U. S. 272; *Louisiana v. Taylor*, 105 U. S. 454; *Schuyler v. Thomas*, 68 id. 169; *State v. Clark*, 23 Minn. 422; *Scotland County v. Thomas*, 94 U. S. 682.

<sup>2</sup> See § 128, *Mandamus*; also *State v. Lancaster County*, 6 Neb. 214, where this question is ably discussed.

<sup>3</sup> *State v. Lancaster County*, 6 Neb. 214.

but remained the same as if it had never been adopted; and the subscription to the stock of the railroad company having been actually made, under the authority of a legislative act, in January, 1868, was legal; and that the circumstance that the bonds were issued at a later date did not impair their validity.<sup>1</sup> Nor is the validity of the bonds affected by any amendments to or changes *in* the law, or even by its repeal, after the subscription is actually made, so that a contract between the parties can be said to exist, as the legislature has no power to abridge or destroy a contract.<sup>2</sup>

<sup>1</sup> *Calaway County v. Foster*, 93 U. S. 567; *County of Macon v. Shores*, 97 U. S. 272; *Huidekoper v. Dallas County*, 3 Dill. (U. S. C. C.) 171. See also *Louisiana v. Taylor*, 105 U. S. 454; *County of Schuyler v. Thomas*, 98 id. 169. Where the charter of a railroad company, granted by Missouri prior to the adoption of the constitution in 1865, made it lawful for the county court of any county in which any part of the route of said railroad or of its authorized branches might be, or for any county adjacent thereto, to subscribe to the stock of the company, and to issue bonds of the county in payment therefor, the power of the county court so to subscribe did not become subject to § 14 of art. 11 of that constitution, which requires the assent of two-thirds of the qualified voters of the county to such subscription. *County of Henry v. Nicolay*, 95 U. S. 619; *County of Cass v. Gillett*, 100 id. 585. See also *Nicolay v. St. Clair County*, 3 Dill. (U. S. C. C.) 163. The fourteenth section of the constitution of Mississippi, ratified Dec. 1, 1869, which declares that "the legislature shall not authorize any county, city, or town to become a stockholder in or to lend its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election or a regular election to be held therein, shall assent thereto," was held to be wholly prospective; and it was held that it did not abrogate previous acts of the legislature conferring authority to subscribe for stock. *Supervisors v. Galbraith*, 99 U. S. 214. A resolution of a board of supervisors appropriating bonds as a subscription in aid of a railway constitutes a contract, which will not be impaired by a subsequent

change in the constitution of the State. *Moultrie County v. Rockingham Ten Cent Savings Bank*, 92 U. S. 631. See *Railroad Co. v. Falconer*, 103 id. 821. But a popular vote, authorizing a railway subscription, does not give a vested right in the subscription to the railway company. A change of the State constitution forbidding such subscriptions will render such vote unavailing, if the subscription is not actually made prior to the constitutional change. *Wadsworth v. Supervisors*, 102 U. S. 534; *Railroad Co. v. Falconer*, 103 U. S. 821.

<sup>2</sup> In 1843 and 1858 the city of Mobile issued bonds when there was no limit imposed on its taxing power; in 1869 it issued bonds when it could only raise two per cent on its taxable property, and by a contract with a railroad company for whose benefit they were issued it was provided that the interest on them was to be paid by imposing a general or special tax, and the city ordinance establishing the contract was approved by the legislature. Afterwards, by subsequent legislation, the city was limited to one per cent of its taxes in paying its indebtedness, and was authorized to issue bonds for the funding of its debt, and restricted in its levy of taxes to the raising of such amounts as would pay the interest of these bonds and its current expenses. A holder of a number of the bonds of 1869, after default in payment of the coupons, recovered judgment against the city. The city was still indebted for some of the bonds of 1843 and 1858. It was held that all legislation subsequent to the approval of the contract of 1869 was inoperative so far as it impaired that contract; that the holder of the judgment was entitled to have all the

**SEC. 125. Effect of Division of County, Town, etc., after the Bonds are issued.** — If after a county or other municipal corporation has voted to subscribe for stock in a railroad company, it is divided, or a portion of its territory is detached therefrom, the portion detached still remains liable for the payment of its proportion of such bonds; and the legislature has no power, as against the railroad company or the holders of its bonds or notes, to release it therefrom, and it will be compelled by *mandamus* to comply with the law. Thus, in a Kansas case,<sup>1</sup> the legislature detached from Sedgwick county a portion of its territory, and attached it to the new county of Harvey. It declared that this detached territory should continue liable for a certain proportion of the railroad bonded indebtedness of Sedgwick county, and that the

taxing power of the city exercised within constitutional limits, and that after the payment of the current expenses he was entitled to share *pro rata* in the residue with other creditors who had no specific lien on the taxes; that the bonds of 1843 and 1858 could not be affected by any limits on the taxing power. *Sibley v. Mobile*, 3 Woods (U. S. C. C.), 535. An act of the legislature of Louisiana provided for the issue of the consolidated bonds of the city of New Orleans, and that a special tax should be annually levied on real estate and slaves, to raise a certain sum to be applied to the payment of the principal and interest of said bonds. It was held that this was a contract with the bondholders, unaffected by subsequent legislation; that their remedy was at law, and that they were not entitled to priority of payment over other bondholders, out of all taxes raised on real estate. *Maenhaut v. New Orleans*, 3 Woods (U. S. C. C.), 1. A statute authorizing certain counties to issue bonds, and making it the duty of the board of supervisors to levy a special tax to pay the interest and principal of said bonds as they become due, and giving the holder of them the right to compel such levy by *mandamus*, is not repealed by a subsequent statute which restricts the taxing power of counties, so as to affect the rights of holders of bonds issued prior to the adoption of the constitution. *United States v. Jefferson County*, 5 Dill. (U. S. C. C.) 810. Where the charter of a railroad company authorized a city to issue bonds "bearing interest at the rate of six

per cent per annum," and the city issued bonds bearing interest at the rate of ten per cent, it was held that the bonds were valid to the extent of the principal and six per cent interest. Where authority is given "to any incorporated town or city" in a county to subscribe to the capital stock of a railroad company, such authority is not limited to towns and cities incorporated at the passage of the statute; all that is required is that the town or city be incorporated at the time the subscription is made. *Lewis v. Clarendon*, 5 Dill. (U. S. C. C.) 329.

<sup>1</sup> *Sedgwick County v. Bailey*, 11 Kan. 631. But see *State v. Lake City*, 25 Minn. 504, where it was held that it is constitutionally competent for the legislature to erect, out of a portion of the territory of an existing town, a new municipal corporation, without making any provision for the debts and liabilities of such town, previously incurred. In such case, the old town remains solely responsible for such debts and liabilities, and no claim can be enforced against the new corporation in respect thereto, either in favor of the town or its creditors. Such legislation impairs no contract rights or obligations, though the taxable resources of the town may be thereby largely diminished, and though such debts may have been incurred upon the faith of a statutory pledge that the town would provide a sufficient sinking-fund, by taxation, to pay the same at maturity, it not appearing that its power so to do has been rendered ineffectual for that purpose.

county clerk of Harvey county should annually apportion on the property of this territory the amount of taxes necessary to pay such proportion of the indebtedness. Upon the failure of the clerk of Harvey county to make this apportionment, the board of county commissioners of Sedgwick county were held to be proper parties in a proceeding by *mandamus* against him to compel him to perform such duty. And where the division is only of railroad bonded indebtedness, and there is no proof of the amount of property or of the other indebtedness of the county prior to the division, and no proof of the comparative population or wealth of the detached territory and the remaining portion of the county, it is impossible for the court to say that the division prescribed by the legislature is not just and equitable.

In a later case,<sup>1</sup> before the same court, certain railroad bonds were authorized and issued by the county of Marion prior to the detachment of *one township*. By virtue of an act of the legislature of 1879, and *after* the detachment, the county of Marion took up these railroad bonds, and issued funding bonds in lieu thereof. Certain changes were made in the time, the amount, and the rate of interest of these bonds, — changes all beneficial to the county. It was held that though these funding bonds were technically both authorized and issued *after* the detachment, yet, within the spirit of the law, and legally, the funding bonds are a charge against the detached territory, the same as the railroad bonds had been.<sup>2</sup>

SEC. 126: **Defences to Actions upon Bonds, etc.** — As against a *bond fide* holder, a municipal corporation cannot set up in defence to an action upon its bonds, issued in aid of a railroad corporation, any merely formal defect therein, unless such defect is apparent upon the face of the bond or appears from some recital therein; but where there is a total lack of authority to issue the bonds, — as, where they are issued under an act of the legislature which is unconstitutional,<sup>3</sup> or without the authority of the legislature,<sup>4</sup> —

<sup>1</sup> *Marion County v. Harvey County*, 26 Kan. 181. If a town or county is divided after aid has been voted, and the legislature provides that both parts shall remain liable for its debts as before, each part thereof is only liable for its proportion of the debt so created, according to the valuation of the whole town at the time when the aid was voted. *Hurt v. Hamilton*, 25 Kan. 76.

<sup>2</sup> Where a county is divided, the new  
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county cannot issue interest-bearing bonds for the indebtedness assumed by it. *Eagle v. Beard*, 33 Ark. 497.

<sup>3</sup> *Webb v. Lafayette County*, 67 Mo. 353; *Ogden v. Daviess County*, 102 U. S. 634; *Anthony v. Jasper County*, 4 Dill. (U. S. C. C.) 136; *Sherrand v. Lafayette County*, 3 id. 236.

<sup>4</sup> *Clay v. Hawkins County*, 5 Lea (Tenn.), 137.

such defence is available; because the defect is one of power, and not of form. Unless the act confirming authority to issue bonds expressly restricts the issue to a particular railroad, the act is applicable to a railroad organized under a *subsequent* statute, or the subscription may be made to a corporation not yet organized.<sup>1</sup> But authority given to subscribe for the stock of a particular railroad does not authorize a subscription in aid of a different line.<sup>2</sup>

Where authority is given to subscribe for stock to a certain amount, a subscription for more than that amount is simply void, and is not good for any amount.<sup>3</sup> But where a town voted to issue bonds for a certain amount, in sums of \$500 each, it was held that the fact that the amount could not be exactly divided into such sums did not invalidate the vote.<sup>4</sup>

Where the statute provides how a meeting to vote upon the question of issuing bonds in aid of a railroad shall be held, unless it is held in the manner specified, the town cannot, by *mandamus* or otherwise, be compelled to issue its bonds. Thus, where the statute provided that the meetings should "be held and conducted, and returns thereof made as is provided by the township organization law," a vote taken by a town whose meeting was presided over by a moderator, and without the judges or clerks required in general elections, was held not sufficient to authorize the issue of bonds by the town officers, — it being provided by the township election law, that "the supervisor, assessor, and collector of the town" shall be *ex officio* judges of elections, except as otherwise provided by law; and consequently their issue could not be compelled.<sup>5</sup>

**SEC. 127. Evidence in Actions to enforce payment of Bonds.** — In an action by the holder of bonds against a municipality, where the validity of the subscription depends upon its ratification by a majority of the taxpayers, the plaintiff may use the poll-books of the election, containing the names of every voter, and none but taxpayers, and the certificate of returns to the city council that a majority had voted, as evidence that the subscription was properly rati-

<sup>1</sup> *Stebbins v. Pueblo County*, 2 McCrary (U. S. C. C.), 196; *Cass County v. Johnston*, 95 U. S. 360; *Daviess County v. Huidekoper*, 98 U. S. 98.

<sup>2</sup> *New Brunswick R. R. Co., ex parte*, 2 Pugsley (New Brunswick), 78.

<sup>3</sup> *Reinman v. Covington, &c. R. R. Co.*

7 Neb. 310; *Jackson County v. Brush*, 77 Ill. 59.

<sup>4</sup> *Turner v. Woodson County*, 27 Kan. 314.

<sup>5</sup> *Chicago, &c. R. R. Co. v. Mallory*, 101 Ill. 503.

fied; and he is not obliged to go further and show that every person voting was entitled to do so.<sup>1</sup>

**SEC. 128. Mandamus to compel issue, and levying of tax to pay bonds, lies when.**—Where the statute has been pursued in all its requirements, the election properly called, by a proper notice thereof, and an election held resulting in favor of a subscription by the number of voters required by the act giving the authority, and the railroad company has complied with all the conditions imposed, and the officers charged with the duty of issuing the bonds are invested with no discretion in the matter, the company is entitled to the bonds so voted, and their issue at the suit either of the corporation or of its creditors will be compelled by *mandamus*; <sup>2</sup> and where

<sup>1</sup> *Hannibal v. Fauntleroy*, 105 U. S. 408.

<sup>2</sup> *Chicago, &c. R. R. Co. v. St. Anne*, 101 Ill. 151; *People v. Harp*, 67 Ill. 62; *Chicago, &c. R. R. Co. v. St. Anne*, 101 id. 151; *Selma, &c. R. R. Co., ex parte*, 45 Ala. 696; *California Northern R. R. Co. v. Butte County*, 18 Cal. 641; *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 435; *Amy v. Supervisors*, 11 Wall. (U. S.) 176; *Raleigh, &c. R. R. Co. v. Jenkins*, 68 N. C. 502; *Bittinger v. Bell*, 65 Ind. 445; *People v. Allen*, 56 N. Y. 538; *People v. Batchelor*, 53 N. Y. 128; *Cincinnati, &c. R. R. Co. v. Clinton County*, 1 Ohio St. 77; *Clarke County v. Paris, &c. Turnpike Co.*, 11 B. Mon. (Ky.) 143; *Cumberland, &c. R. R. Co. v. Washington County*, 10 Bush (Ky.), 564; *Jager v. Dougherty*, 61 Ind. 528; *Mt. Vernon v. Hovey*, 52 id. 563; *People v. Logan County*, 63 Ill. 374; *People v. Glann*, 70 Ill. 232; *Louisville, &c. R. R. Co. v. Davidson County*, 1 Sneed (Tenn.), 637; *United States v. Clark County*, 96 U. S. 211; *Illinois, &c. R. R. Co. v. Barnett*, 85 Ill. 313; *Howland v. Eldridge*, 43 N. Y. 457; *United States v. Badger*, 6 Biss. (U. S. C. C.) 308; *Knox County v. Aspinwall*, 24 How. (U. S.) 376; *Brodie v. McCabe*, 33 Ark. 690; *Sibley v. Mobile*, 3 Woods (U. S. C. C.), 535; *Supervisors v. United States*, 4 Wall. (U. S.) 435; *Rusch v. Des Moines County*, 3 Woods (U. S. C. C.), 313; *Van Hoffmann v. Quincy*, 4 Wall. (U. S.) 535; *Muscataine v. Mississippi, &c. R. R. Co.*, 1 Dill. (U. S. C. C.) 563; *Riggs v. Johnson*

*County*, 6 Wall. (U. S.) 166; *Weber v. Lee County*, 6 id. 210; *Supervisors v. Durant*, 9 id. 415; *United States v. Keokuk*, 6 id. 514; *Mayor v. Lord*, 9 id. 409; *Cass County v. Johnston*, 95 U. S. 360; *Lansing v. County Treasurer*, 1 Dill. (U. S. C. C.) 522; *Cass County v. Johnston*, 95 U. S. 360; *Welch v. Ste. Genevieve*, 1 Dill. (U. S. C. C.) 130; *United States v. Clark County*, 96 U. S. 211. Where, under N. Y. Laws 1869, ch. 907, and before the passage of the amendatory act of 1871, ch. 925, proceedings had been regularly taken to bond a town in aid of a railroad, and the county judge had made his adjudication and record and had appointed commissioners, it was held that the proceedings were not invalidated by the amendatory act; and that the commissioners might issue bonds, all payable in thirty years; that the act of 1871 made it optional with the commissioners to thus issue the bonds or to make them payable in a shorter time by instalments. *Syracuse Savings Bank v. Seneca Falls*, 86 N. Y. 317. Under the act of the Vermont legislature, approved Nov. 12, 1867, authorizing towns to subscribe for stock, and issue bonds in aid of railroads, it is not sufficient to put the instrument of assent and certificate thereof named in said act on file, but they must be filed and recorded in order to give the commissioners authority to make the subscription. Such want of authority may be set up in answer to *mandamus* by an assignee of the claim of the railroad company, to compel the issue of bonds in pursuance of such

an election has been held, and a subscription voted without conditions, the duty of the officers to make the subscription is complete, and the act being merely ministerial may be compelled by *mandamus*.<sup>1</sup>

Where bonds issued by a township on a subscription to the stock of a railroad company are by law required to be countersigned by the town clerk before being delivered, such act is a mere ministerial act, and it is not his province, when called upon to do the act, to determine whether the proper steps have been taken to authorize the issuance of the bonds. Hence, upon an application for a *mandamus* to compel a town clerk to countersign bonds executed by the town supervisor, the clerk cannot set up matters affecting the legality of the steps required to be taken before the bonds could properly issue, as a reason for refusing to countersign them.<sup>2</sup> And the remedy will not be defeated by mere *laches* upon the part of the company. Thus where a *mandamus* to compel the issue of town bonds in exchange for its stock was not asked for until nearly six years after the relator's right accrued, it was held that, in exercising the discretion of the court in reference to the writ, the delay would not be treated as *laches*, in the absence of any evidence that the town

subscription. *Lamoille Valley R. R. Co. v. Fairfield*, 51 Vt. 257. That creditors may enforce a subscription (*County of Morgan v. Allen*, 103 U. S. 498; *Morgan County v. Thomas*, 76 Ill. 120) after his claim has been established at law, *Smith v. R. R. Co.*, 99 U. S. 398.

<sup>1</sup> *People v. Logan County*, 63 Ill. 374; *People v. Cass County*, 77 id. 438.

<sup>2</sup> *Houston v. People*, 55 Ill. 398. In a proceeding to compel a county to issue its bonds in payment of a subscription to the stock of a railroad company, a showing that the county court, at a time subsequent to the adoption of the Illinois constitution of 1870, entered an order reciting that the election therefor had been duly held in pursuance of law, and directing the subscription to be made, was held not to preclude the county from denying that the election was properly held, or to relieve the relator from the burden of showing that it was so held. And where no notice that the want of power to make the subscription would be relied upon was required to be given when the bonds should be called for in payment

of such subscription, it was held that the railroad company would not be heard to urge, as against the right of the county to deny the existence of the power, that they had performed labor and incurred liabilities on the faith of the supposed subscription; and that until it is shown that the statutory notice of such special election was properly given, there will be no inference in favor of the validity of the election, and the power to make the subscription will fail; otherwise, in case of an election under the general election law, where the time of holding the same is designated by the statute; and that the Illinois constitution of 1870, absolutely prohibiting any municipal subscription in aid of railroads except when made in pursuance of an election held prior to the adoption thereof under laws then existing, operated to repeal the curative act of 1869. The proviso to the prohibitory clause of the constitution saves the power only in cases where it was conferred by a vote of the people, not where it depended alone upon legislative grant. *People v. Jackson County*, 92 Ill. 441.



was injured thereby, — especially as the contract was mutual, and it had been at all times, since the relator's railway was built, in the power of the town to enforce an exchange of its bonds for stock of the company.<sup>1</sup> Nor can a county, city, or town refuse to issue bonds for a subscription which has been voted, upon the ground that the vote is for the issue of bonds more favorable to it than was contemplated by the statute, — as, that it was voted to make them payable in *five* instalments, where the statute contemplated their payment in three.<sup>2</sup> A railroad company has no vested right to a subscription until it is actually made; and until that time the legislature may repeal or modify the act in any manner it deems advisable; and such repeal would be a complete answer to the writ.<sup>3</sup>

*Mandamus* is, when appropriate, an action at law to recover money, and is subject to the principles which govern such actions;<sup>4</sup> and the denial of the writ is held to be conclusive in a subsequent action as to the invalidity of the bonds, although the fact that the decision was based on that ground is inferred from the pleadings, and not from the express language of the judgment.<sup>5</sup> These rules were applied in a case<sup>6</sup> where a township issued its bonds with interest coupons attached, and A. indorsed the bonds to B., and B. indorsed them to the plaintiff after they were overdue. While the bonds were in B.'s possession and overdue, B. was party to a suit in chancery in a State court, in which D., an owner of real estate alleged to be encumbered by mortgage to secure payment of the bonds, sought to have them declared invalid; and was also a co-plaintiff in a cross bill in the same suit, in which it was sought to have the bonds declared valid and the mortgage foreclosed. In these proceedings the bonds were declared invalid for want of authority in the trustee to issue them. During the same period B. applied to the State court for a writ of *mandamus* to compel the trustees of the township to levy a tax for payment of interest on the bonds; and in this suit the bonds were declared invalid upon the same grounds as in the equity suits. B. then indorsed the notes and coupons to the plaintiff, who brought *mandamus* in the United States court to

<sup>1</sup> *State v. Jennings*, 48 Wis. 549.

<sup>2</sup> *Louisville, &c. R. R. Co. v. Davidson*, 1 Sneed (Tenn.), 637.

<sup>3</sup> *State v. Garoutte*, 67 Mo. 445; *Cumber-land, &c. R. R. Co. v. Barren County*, 10 Bush (Ky.), 604; *People v. Pueblo County*, 2 Col. 360.

<sup>4</sup> *Postmaster-General Kendall's Case*, 12 Pet. (U. S.) 524; *Louis v. Brown Township*, 109 U. S. 162.

<sup>5</sup> *MILLER, J.*, in *Louis v. Brown Township*, 109 U. S. 166; *Black v. Commissioners*, 99 U. S. 686.

<sup>6</sup> *Louis v. Brown Township*, *ante*.

compel payment of the bonds; and it was held that he was estopped by the former proceedings. When bonds mature, and the municipal authorities refuse or omit to levy a tax to pay the same, *mandamus* is the proper remedy to compel them to do so,—particularly after the validity of the bonds has been established by obtaining a judgment for the same.<sup>1</sup>

In the United States court, the fact that the officers of the town, city, or county, have been enjoined from collecting the tax will be no answer to the writ, where the plaintiff has procured a judgment.<sup>2</sup>

<sup>1</sup> *State v. Johnson County*, 12 Iowa, 327. Where a county has been authorized to issue railroad aid bonds, parties who have recovered judgments on such bonds are entitled to a writ of *mandamus* to the county court, commanding a levy of a special tax to satisfy such judgments, if there are no other funds of the county out of which they can be paid. *United States v. Lincoln County*, 5 Dill. (U. S. C. C.) 184. Where a statute authorizes a county to issue its negotiable bonds, and makes it the duty of the county court "to levy a special tax of sufficient amount to pay the interest and principal of the bonds as they become due," the power of taxation thus given enters into and becomes a part of the obligation of the contract between the county and every holder of such bonds; and under the Constitution of the United States, this obligation of the contract cannot be impaired or lessened in any degree by the constitution or laws of the State afterwards enacted. *United States v. Jefferson County*, 1 McCrary (U. S. C. C.), 356. Where municipal bonds were issued under authority of law, and there was a law, at the time of their issuance, directing a tax to be levied for their protection, it was held that the law for the tax becomes a part of the contract, and the holder of such bonds has a right to regard it as a part of his security; and that the measure of his right is the constitutional limit of the power which the legislature could grant to the municipality when the contract was made, and that these contracts are protected by the U. S. Constitution, and cannot be impaired by the subsequent act of a State legislature or constitutional convention. *Brodie v. McCabe*, 33 Ark. 690. A *mandamus*, prayed

by a holder of the "premium bonds" of New Orleans, to compel the city officers to levy, collect, and apply the special tax of five mills on the dollar, as provided by La. Acts 1876, no. 31, was granted. The Supreme Court will not interfere with the right of the city to remodel her budget and tax ordinances, to reduce her estimates of necessary expenses, and the rate of taxation required to meet the same, provided only she maintains the appropriation for the "premium bonds," and the special tax of five mills required by said act. *Moore v. New Orleans*, 32 La. An. 726; *State v. New Orleans*, 32 id. 763; *Hopple v. Brown*, 13 Ohio St. 311; *Com. v. Allegheny County*, 32 Penn. St. 218; *Com. v. Perkins*, 43 Penn. St. 400; *Com. v. Pittsburgh*, 43 id. 391; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Columbia County v. King*, 13 Fla. 452; *Limestone County v. Rothes*, 48 Ala. 433; *Shelby County v. Cumberland, &c. R. R. Co.*, 8 Bush (Ky.), 209; *Flagg v. Palmyra*, 33 Mo. 440; *McLendon v. Anson County*, 71 N. C. 38. The court will not, however, because the municipal officers evade their duty, appoint officers to assess and collect the tax. Indeed, they have no power to do so, and to attempt it would be an unwarranted usurpation of power. *Heine v. Levee Commissioners*, 19 Wall. (U. S.) 655; *Rees v. Watertown*, 19 id. 107. Nor will the court issue the writ where the acts sought to be compelled are unauthorized. *United States v. Macon County*, 99 U. S. 582; *Supervisors v. United States*, 18 Wall. (U. S.) 71; *United States v. Clark County*, 96 U. S. 211.

<sup>2</sup> *Knox County v. Aspinwall, ante*; *Supervisors v. United States*, 4 Wall. (U. S.) 435. And see also *Cumberland*,

Where the authority is simply to aid a railroad company, and to levy and collect taxes for that purpose, or to borrow money and pay the same, it is optional with the town, etc., whether to issue bonds or not; and the railroad company cannot elect to take bonds, and bring proceedings to compel their issue. Its only claim is for money, and it has no right to say how it shall be paid.<sup>1</sup> *Mandamus* lies to compel the treasurer of a county, city, or town, to pay over to bondholders money which has been received by him, — the proceeds of a tax levied for that purpose.<sup>2</sup> But in these proceedings, the plaintiff must clearly establish his right to have the bonds issued to him or to have the tax levied; and except in the case of a *bond fide* holder, the burden of showing that all the requisite steps were taken by the municipal corporation to render the bonds valid rests upon the plaintiff, and jurisdiction in such cases will not be presumed; and this is also the rule where a writ of *certiorari* is brought.<sup>3</sup>

Where the company knew that there was not a majority of the legal votes cast in favor of subscription, and that there was no legal power to make the subscription, or to issue the bonds, before incurring liability in reliance thereon, it was held that it could not enforce the issue of the bonds. And where, upon *mandamus* to compel the authorities of a county to make a subscription to a railroad company, the return showed that the directors of the company, in

&c. R. R. Co. v. Washington County, 10 Bush (Ky.), 564.

<sup>1</sup> Chicago, &c. R. R. Co. v. St. Anne, 101 Ill. 151.

<sup>2</sup> State v. McCrillis, 4 Kan. 250; State v. Craig, 69 Mo. 565.

<sup>3</sup> People v. Oldtown, 88 Ill. 202; People v. Morgan, 55 N. Y. 587; Chicago, &c. R. R. Co. v. Mallory, 101 Ill. 583; People v. Corwin, 2 Hun (N. Y.), 385; Santa Cruz R. R. Co. v. Santa Cruz County, 62 Cal. 239; Humphrey County v. McAdoo, 7 Heisk. (Tenn.) 585; Atchison, &c. R. R. Co. v. Jefferson County, 12 Kan. 227. Although a railroad company has not expended enough in the city or township to entitle it to the whole tax voted in aid of the road, it may collect the part earned. Casady v. Lowry, 49 Iowa, 523. A tax to aid in the construction of a railroad was voted in the township of K., to be expended in that and two other townships specified. Double the amount of the tax was expended by the company in con-

structing the road through K., but nothing was expended in either of the other townships. It was held that the three townships should be regarded as a unit, and that the tax was not forfeited by the failure to expend any part of it in either of the other townships specified. Merrill v. Welsher, 50 Iowa, 61. It was also held in this case that the survey of a line of a railroad before voting a tax to aid in its construction does not constitute a representation respecting the location of the line of the road which is binding upon the company, or upon which the taxpayer is authorized to rely; that the tax is assignable, and that a suspension of work upon the road for nearly four years did not work a forfeiture of the tax; and that in such case the company would not be estopped to collect the tax because it had advised, when the work temporarily ceased, that the collection of the tax should be suspended.

contracting for the building of the road, gave to the contractors too large a sum, it was held that such fact was no defence; that the directors had the power to make contracts binding on stockholders, and that if they were fraudulently made, the stockholders might have them rescinded on a bill in equity.<sup>1</sup>

Where an act of the legislature authorized a city to issue its bonds in aid of a railroad company, and ratified a contract by which the city, having issued such bonds, agreed to appropriate sufficient moneys from its treasury to pay the accruing interest thereon,—it was held that the city was thereby authorized to levy a tax to pay said interest, and such authority carried with it the duty to make the levy.<sup>2</sup> But when at the time of the issue of the bonds the constitution of the State limited the taxing power of the city to a certain per cent upon its taxable property, it was held that the city could not exceed that limit; but having first levied a tax sufficient to pay its current expenses, it was bound by its contract to exhaust, if necessary, the residue of its taxing power in order to pay the interest of the bonds. And that it was not competent for the legislature, by an act passed after the issue of the bonds, to direct that the entire taxing power of the city should be exhausted for the payment of the holders of bonds of another issue, who had no specific lien upon the fund raised by taxation, or any part thereof. A city, with a limited power of taxation, which, by neglect to levy and collect taxes, has permitted the interest on certain of its bonds to fall in arrears, cannot defend an application for the writ of *mandamus* to compel the levy of a tax to pay a judgment recovered for interest due on bonds of a later issue, by alleging that a levy to pay the interest in arrears on the older issue would exhaust its taxing power, when at the same time it expresses no purpose to levy a tax for that object.

**SEC. 129. Remedy to annul Bonds, etc.**—A municipal corporation which has issued bonds without authority of law may maintain a suit to have the bonds declared void, and delivered up to be cancelled; but such a suit cannot be maintained where neither the bonds nor their owners are within the jurisdiction of the court;<sup>3</sup> and a judgment

<sup>1</sup> *People v. Logan County*, 63 Ill. 374.

<sup>2</sup> *Sibley v. City of Mobile*, 4 Am. L. Times, N. S. 226.

<sup>3</sup> *Waverly v. Auditor*, 100 Ill. 344. An action having been brought for a specific performance of a contract of a town

to issue bonds in payment of its subscription to the stock of a railway company, the court held the subscription not binding, and that the defendants were therefore entitled to positive relief by injunction, restraining all persons claim-

declaring bonds, etc., void is not binding upon any one except the parties to the action who were personally served with notice or appeared.<sup>1</sup> Any taxpayer of a county or municipal corporation may bring a bill in equity to restrain the payment of illegal bonds;<sup>2</sup> and where the treasurer of a county has funds in his hands which, unless restrained, he will apply in payment of bonds issued by the county without warrant of law, and which are void in the hands of the holders, a court of equity will restrain such payment upon a bill brought by the county.<sup>3</sup>

If a railroad company fails to comply with the conditions on which a county subscription has been made to its stock, an injunction will lie to prevent its receiving bonds agreed to be issued in payment, and to compel the surrender and cancellation of any already issued; and this remedy may be invoked by any one who is a citizen and taxpayer of the county.<sup>4</sup> The validity of the proceedings should be attacked by *certiorari*, bill of review, or writ of error.<sup>5</sup> A bill alleging irregularities in the issue of bonds to a railroad company should point out specifically such irregularities, to call attention of defendants to them and advise them of what they are to defend or explain.<sup>6</sup>

Where there is a total lack of authority to issue the bonds, or where they were fraudulently issued, they may be annulled upon proper proceedings. Thus, where the record showed that in Septem-

ing under the company or the plaintiff from asserting any claim against the town by reason of such stock subscription. *Perkins v. Port Washington*, 37 Wis. 177.

<sup>1</sup> *Brooklyn v. Ins. Co.*, 99 U. S. 362; *Roberts v. Bolles*, 101 id. 119; *Empire v. Darlington*, 101 id. 87.

<sup>2</sup> *Winston v. Tennessee, &c. R. R. Co.*, 1 Baxt. (Tenn.) 60. Where the statute provided a mode for contesting an election to subscribe to the stock of an internal improvement company, a court of equity may, on bill filed by the requisite number of the taxpayers, enjoin the issue of bonds of the county or corporation in payment of the subscription, if irregular. In such case, the supervisors of a county having resolved to subscribe \$100,000 on condition that a certain town subscribe \$50,000, it was held that a resolution to rescind the subscription was invalid. The town having made the subscription of \$50,000, the

supervisors might carry out their subscription of \$100,000, and direct the issuance of the bonds of the county therefor in the mode prescribed by the statute. Such subscription may be subsequently confirmed by special act of the legislature. *Redd v. Henry County*, 31 Gratt. (Va.) 695. Where the statute makes the officer personally liable for a refusal to perform a duty imposed upon him, an action will not lie against the municipal corporation for damages resulting from the non-issue of bonds duly subscribed. *Santa Cruz R. R. Co. v. County of Santa Cruz*, 62 Cal. 180.

<sup>3</sup> *Missouri River, &c. R. R. Co. v. Miami County*, 12 Kan. 230.

<sup>4</sup> *Wagner v. Meety*, 69 Mo. 150.

<sup>5</sup> *Anderson County v. Houston & Great Northern R. R. Co.*, 52 Tex. 228.

<sup>6</sup> *Matthews v. Blount*, 3 Lea (Tenn.), 120.

ber, 1871, a vote was had by which the county board was authorized to subscribe to the capital stock of a railway company; and that in September, 1873, two members of the board met, without any request or call for a special session, and without any notice to the third member, — who was present in the county and could have been served with notice, — and not at a regular or adjourned session; and that notice of such session was intentionally and fraudulently withheld by the company from said third member; and that at such session the two commissioners present passed a resolution directing a subscription to the capital stock of a railway company, and the subscription was accordingly made, — it was held that the subscription was not a legal and binding contract upon the county, and that it could maintain an action to have it set aside and cancelled.<sup>1</sup> So, where a railroad company has done that which would release an individual from his subscription, a municipal corporation is released from its subscription, and a rescission of the contract will be decreed upon a bill brought for that purpose.<sup>2</sup>

A municipal corporation is not estopped from maintaining a bill in equity to enjoin the officers of a railway company from disposing of its bonds, and to cancel them, by the acts of its officers in assuming control over the railway stock received therefor, and levying

<sup>1</sup> Paola & Fall River Railw. Co. v. Anderson Co., 16 Kan. 302; Anderson Co. v. Paola & Fall River Railw. Co., 20 Kan. 534.

<sup>2</sup> Crawford County v. Pittsburgh, &c. R. R. Co., 32 Penn. St. 141. Bonds of a county, sealed and signed by the proper officers, made payable to bearer, and containing a recital that they were issued in accordance with a law of the State, and were authorized by a vote of the people of the county, are *prima facie* valid, although the particular purpose for which the bonds were voted is not stated therein. Carpenter v. Buena Vista County, 5 Dill. (U. S. C. C.) 556. In Springport v. Teutonia Savings Bank, 75 N. Y. 397, a town issued negotiable bonds in aid of a railroad, under a statute providing that a certified copy of affidavits of the town assessors that the required consents of a majority of the taxpayers have been given, shall, together with the consents, be "presumptive evidence" of the facts therein contained. After certain savings banks had

become holders of the bonds, a judgment was rendered by the Court of Appeals annulling the proceedings for bonding the town, it appearing that, although the affidavits and consents were in form sufficient, the consents of a majority had not in fact been obtained. In a subsequent action by the town against these banks to have the bonds delivered up and cancelled, it was held that the defendants, not being parties to said judgment, were not thereby estopped from setting up the affidavit of the assessors as proof of the consents, etc.; that the record of the proceedings for the issuance of the bonds created a *prima facie* liability; that it was incumbent on the town, notwithstanding said reversal of proceedings, to rebut the presumption afforded by the assessors' affidavits; that the affidavits are not conclusive in favor of the defendants, and the railroad commissioners could not estop the town from disputing the consents; and that the town was entitled to the relief sought.

taxes and paying the interest on the bonds, where the subscription is invalid because of a failure to comply with the law.<sup>1</sup> Thus, a county will not be estopped by the completion of a railroad according to the terms of an attempted subscription, from denying the legality of the election. No notice that the want of power to make the subscription would be relied upon is required to be given when the bonds are called for in payment of the subscription; nor will the company be heard to urge, as against the right of the county to deny the existence of the power, that it had performed labor and incurred liabilities on the faith of the supposed subscription.<sup>2</sup> But a municipal corporation having issued certain railway-aid bonds after a decree of the court had determined that the county had the power to do so, all persons purchasing such bonds become privies to the decree, and may rely upon its estoppels.<sup>3</sup> So, where at an election held according to law, the people of a county authorized their proper representatives to treat certain outstanding county obligations as properly authorized by law, for the purpose of settling with the holders, and the settlement has been made, the validity of the obligations can no longer be contested; and a judgment upon the merits, dismissing an action brought by certain taxpayers of a county against the county commissioners, to enjoin the issue by them of certain railway-aid bonds, is an estoppel to a subsequent action after the bonds have been issued, brought in the name of the State upon the relation of certain other taxpayers of the same county, against the county commissioners, the railway company, and purchasers of the bonds, to have the bonds adjudged illegal and void.<sup>4</sup> In proceedings of this character the bondholders are necessary parties;<sup>5</sup> and those not made parties thereto are not affected by the proceedings.

**SEC. 130. Municipal Corporations may Enforce Delivery of Stock to them.** — A railroad corporation, upon the payment of a subscription to its stock by a municipal corporation, is under the same obligation to deliver the stock to it that it is under to individual subscribers, and the delivery may be enforced. But the contract of subscription is entire, and until the full subscription is paid, the delivery cannot

<sup>1</sup> Madison County v. Paxton, 57 Miss. 701.

<sup>2</sup> People v. Jackson County, 92 Ill. 441.

<sup>3</sup> State v. C. & L. R. R. Co., 13 S. C. 290.

<sup>4</sup> County of Jasper v. Ballou, 103 U. S. 745.

<sup>5</sup> Board v. Texas, &c. R. R. Co., 46 Tex. 316; Leavenworth, &c. R. R. Co. v. Douglass County, 18 Kan. 169.

be enforced. Thus, in an Iowa case,<sup>1</sup> a county, in accordance with a vote of a duly authorized election, subscribed for \$100,000 of the stock of a railway company, payment of which was to be made in bonds of the county; the articles of incorporation of the company provided that if the instalments of subscriptions were not paid when called for, the amount due should be collected by suit, or the stock with all payments made forfeited, or the stock sold at auction; the by-laws provided that certificates of stock should be issued if desired, upon payment of the first instalment, and that the amount of the instalment should be credited thereon; it was the practice of the company to give, in addition to these, receipts for subsequent payments and paid-up certificates only when all the payments had been made; the county having issued its bonds for \$30,000, and refused to issue more, and brought its action to compel the company to issue stock-certificates for that amount, it was held that the contract was an entire and indivisible one.

A municipal corporation occupies no better position than any other subscriber,<sup>2</sup> and while no formal acceptance of its subscription is necessary,<sup>3</sup> yet until there has been an acceptance express or implied no contract exists. Thus, in a Missouri case,<sup>4</sup> the county court of Greene county, without a vote of the people, by order of June 20, 1870, subscribed \$400,000 to the capital stock of Kansas City and Memphis R. R. Co. Order modified October 4, 1870, so as to make subscription to Hannibal and St. Joseph R. R. Co. to aid in building the K. C. and M. R. R. April, 1871, order made rescinding former orders, and in July, 1871, order rescinding the rescinding order of April, 1871, and bonds issued, payable to H. and St. Jo. R. R. Co., or bearer. It was held that as there was no acceptance by the latter company of the subscription, there was neither a contract nor a consideration for one, and that it was incompetent for the K. C. and M. R. R. Co. to accept the subscription.

**SEC. 131. Remedy of Taxpayer against Issue of illegal Bonds: Collection of tax to pay, etc.**—Any taxpayer of a municipal corporation may bring a bill in equity in his own name and on his own behalf and the behalf of all other taxpayers, to enjoin either the issue of bonds or the raising of money by taxation to pay the same;<sup>5</sup>

<sup>1</sup> *Wapello County v. Burlington, &c.* R. R. Co., 44 Iowa, 585.

<sup>2</sup> *Pittsburgh, &c. R. R. Co. v. Allegheny County*, 79 Penn. St. 210.

<sup>3</sup> *State v. Garoutte*, 67 Mo. 445.

<sup>4</sup> *State v. Garoutte*, 67 Mo. 445.

<sup>5</sup> *Bittinger v. Bell*, 65 Ind. 445; *Wright v. Bishop*, 88 Ill. 302; *Nefzger v. Davenport, &c. R. R. Co.*, 30 Iowa, 642; *Campbell v. Paris, &c. R. R. Co.*, 71



but where the collection of the tax might have been restrained, a taxpayer cannot recover the amount of a tax paid by him, of the treasurer of the corporation, after it has been paid over either to the bondholders or the railroad company.<sup>1</sup> But, as we have seen, a taxpayer may procure an injunction, restraining the treasurer from paying over the money after the tax is collected.<sup>2</sup> After bonds have been issued an injunction will not be granted, unless the municipal corporation has a valid defence to the bonds.<sup>3</sup>

**SEC. 132. Remedies against Municipal Corporations in respect to invalid Bonds, etc.** — Except where the contract is prohibited by a penal law, or is founded upon an immoral consideration,<sup>4</sup> money paid to a municipal corporation for its bonds, which it had no authority to issue, by a *bond fide* holder, may be recovered by such bondholder in an action for money had and received.<sup>5</sup> A repeal of the charter of a municipal corporation defeats liability upon these bonds against the corporation succeeding it, except to the extent to which the latter succeeds to the property of the former,<sup>6</sup> — unless the legislature makes express provision for the payment thereof by the new corporation, as a consideration for the granting of the new charter under a new name. Mere amendments to the charter, or even the

Ill. 611; *Chestnutwood v. Hood*, 68 id. 132; *Redd v. Henry County*, 31 Gratt. (Va.) 695; *Delaware County v. McClintock*, 51 Ind. 325; *Jager v. Dougherty*, 61 id. 418; *New Orleans, &c. R. R. Co. v. Dunn*, 51 Ala. 128; *Winston v. Tennessee, &c. R. R. Co.*, 1 Baxt. (Tenn.) 60.

<sup>1</sup> *Butler v. Fayette County*, 46 Iowa, 326. In a proceeding by a taxpayer against a county treasurer to enjoin the collection of a tax assessed upon the property of a township, for the purpose of meeting an appropriation voted by such township to aid in the construction of a railroad, such township is a necessary party; but the county commissioners, the railroad company, and the persons who signed the petition to the county commissioners for such appropriation, are not, unless it appears that the interests of the last-named persons were adverse to those of the plaintiff. Where, however, a resident citizen and taxpayer of such township asked to be made a party defendant, alleging that the county treasurer was not a citizen and taxpayer of the township,

and had no interest in the suit except as such treasurer, it was held that he should have been made a party. Where a petition to county commissioners for an appropriation to aid in the construction of a railroad contained a condition that the company should build a depot in a certain town, it was held that this condition did not vitiate the petition, or render the proceedings thereon void. *Bittinger v. Bell*, 65 Ind. 445.

<sup>2</sup> *Mississippi, &c. R. R. Co. v. Miami County*, 12 Kan. 230.

<sup>3</sup> *Wilkinson v. Peru*, 61 Ind. 1.

<sup>4</sup> *Thomas v. Richmond*, 12 Wall. (U. S.) 349.

<sup>5</sup> In *Dill v. Wareham*, 7 Met. (Mass.) 438, money paid to a town for the exclusive right of digging oysters, when the town had no authority to give such a right, was recovered back in an action for money had and received. *Marsh v. Fulton County*, 10 Wall. (U. S.) 676.

<sup>6</sup> *Mount Pleasant v. Beckwith*, 100 U. S. 514.

granting of a new charter, where the substantial identity of the corporation is not destroyed, do not defeat the rights of creditors.<sup>1</sup> In the case last cited<sup>2</sup> it was held that a change in the charter of a municipal corporation, in whole or part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, embracing substantially the same corporators and the same territory, will not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities, although different powers are possessed under the amended or new charter, and different officers administer its affairs.

**SEC. 133. Rules of Construction adopted by United States Court.**

— Upon the construction of these enabling acts, the United States Court will follow the decisions of the highest appellate court from which the question arose, unless the decisions of that court are conflicting or unsettled; in which case it will decide the questions according to its own idea of the law which should control;<sup>3</sup> and a

<sup>1</sup> *Milner v. Pensacola*, 2 Woods (U. S. C. C.), 632; *Broughton v. Pensacola*, 93 U. S. 266.

<sup>2</sup> *Broughton v. Pensacola*, 93 U. S. 266.

<sup>3</sup> *Ohio Life Ins. Co. v. Debolt*, 16 How. (U. S.) 416; *Santonio v. Mehaffy*, 96 id. 312. "The sound and true rule," said TANEY, C. J., in *Ohio Life Ins. Co. v. Debolt*, 15 How. (U. S.) 432, "is that if the contract when made is valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State or decision of its courts, altering the construction of the law." So in *City v. Lamson*, 9 Wall. (U. S.) 485, NELSON, J., speaking for the court, said: "It is urged also that the Supreme Court of Wisconsin has held that the act of the legislature conferring authority upon the city to lend its credit and issue the bonds in question, was in violation of the provisions of the Constitution above referred to. But at the time this loan was made and these bonds were issued, the decisions of the courts of the State favored the validity of the law. The last decision cannot therefore be followed." Again, in *Olcott v.*

*Supervisors*, 16 Wall. (U. S.) 690, the court, speaking through STRONG, J., said: "This court has always ruled that if a contract when made was valid under the Constitution and laws of a State, as they had been previously expounded by its judicial tribunals and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity." To the like effect are some very recent decisions of this court. In *Douglass v. County of Pike*, 99 U. S. 687, upon a review of some of the previous cases, the court said that "the true rule is to give a change of judicial construction in respect of a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment. So far as this case is concerned we have no hesitation in saying that the

similar course would be adopted when the question had never been before the State court.

rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper." *Taylor v. Ypsilanti*, 105 U. S. 60. See also *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73, in which a town in Michigan voted and donated to a railroad company a certain sum upon the condition that it should build a railroad under statute of that State. At the time of the issue and donation of the bonds the courts of the State and the legislature and the executive department held such bonds valid. Afterward, in *People v. Salem*, 20 Mich. 452, and other cases, the Supreme Court of the State held such bonds void and not binding on the municipalities issuing them. It was held that the bonds were valid in the hands of a *bond fide* holder for value, and that the fact that the holder for value did not receive the bonds until after the State Supreme Court had pronounced them invalid, would not affect his rights. If he was not a holder for value he would have all rights that the railroad company had by virtue of its contract with the township; and it was not material that it was a donation, and not a subscription of stock. In *Railroad Co. v. County of Otoe*, 16 Wall. (U. S.) 674, it was held that in the absence of constitutional provisions making a distinction between municipal subscrip-

tions to stock and municipal appropriations of money or credit, there was no solid ground upon which, so far as legislative power was concerned, to rest such a distinction. "Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the taxpayers." *Olcott v. Supervisors*, 16 Wall. (U. S.) 91; *Town of Queensbury v. Culver*, 19 id. 91. At the time the bonds were voted, two or more railroad companies forming a continuous or connected line were authorized by statute to consolidate and form one corporation, the statute investing the consolidated company with the powers, rights, property, and franchises of the constituent companies. It was held that the fact that the aid was voted to one company and the bonds were given to a consolidated company, of which it formed a part, did not invalidate them. The vote was in view of the existing statutes. *County of Scotland v. Thomas*, 94 U. S. 682; *Town of East Lincoln v. Davenport*, id. 801; *Wilson v. Salamanca*, 99 U. S. 504; *Nugent v. Supervisors*, 19 Wall. 252; *Empire v. Darlington*, 101 U. S. 91; *Menasha v. Hazard*, 102 id. 81; *Harter v. Kernochan*, 103 id. 574; *Tipton Co. v. Locomotive Works*, id. 532, 533.

## CHAPTER VIII.

## CORPORATE MEETINGS, AND DIRECTORS.

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| <p>SEC. 134. Notice of Meetings.</p> <p>135. Waiver of Notice: Presumptions.</p> <p>136. Adjourned Meetings.</p> <p>137. General and Special Meetings.</p> <p>138. Majority at Meeting may express Corporate Will.</p> <p>139. Place of Meeting: Meetings held out of State.</p> <p>140. Directors may hold Meetings out of the State.</p> <p>141. Jurisdiction in Equity to restrain.</p> <p>142. Irregular Meetings: Proceedings at Corporate Elections.</p> <p>143. Rule as to proxies, Powers of Inspectors, etc.</p> <p>144. Controverted Elections.</p> <p>145. Holding of Election compelled by <i>Mandamus</i>.</p> <p>146. What Officers may be elected.</p> <p>147. Election of Directors.</p> | <p>SEC. 148. <i>De facto</i> Directors.</p> <p>149. Acceptance by.</p> <p>150. Relation of Directors to Stockholders.</p> <p>151. Relation of Directors to the Corporation and the Public: Liability for Wrongful Acts.</p> <p>152. What must be shown, to sustain Suit against Directors by Stockholders.</p> <p>153. Powers of Directors.</p> <p>154. Delegation of Powers.</p> <p>155. How Directors should act: Formalities.</p> <p>156. Where they may meet.</p> <p>157. Notice of Meetings: Quorum.</p> <p>158. Compensation of.</p> <p>159. Directors' Knowledge of Facts, Effect of.</p> <p>160. Liability to the Public for Fraud.</p> |
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SEC. 134. **Notice of Meetings.**—All meetings of stockholders must be notified in the manner provided by statute, or if no provision is made therefor by statute, in the manner provided therefor in the by-laws, in order to be valid.<sup>1</sup> Thus, where the by-laws provided that meetings of the stockholders should be called by the trustees, the action of the board of trustees was held necessary to convene a legal meeting, and the president of the corporation had no authority, as such, to call a meeting.<sup>2</sup> If no provision in reference to notice exists either in the statute or by-laws, reasonable personal notice must be given.<sup>3</sup>

<sup>1</sup> *Shelby R. R. Co. v. Louisville, &c. R. R. Co.*, 12 Bush (Ky.), 62; *State v. Pettonelli*, 10 Nev. 141.

<sup>2</sup> *State v. Pettonelli, ante*.

<sup>3</sup> *Warner v. Mower*, 11 Vt. 385; *Rex v. Langhorn*, 4 Ad. & El. 538; *People v. Batchelor*, 22 N. Y. 128; *State v. Ferguson*, 31 N. J. L. 107. It is held to

be a plain dictate of reason, that no function intrusted to, or existing in a number of persons, can be rightfully or lawfully exercised without a reasonable notice to all the members composing the body. *People v. Batchelor*, 22 N. Y. 128; *People's Ins. Co. v. Westcott*, 14 Gray (Mass.), 440. And the absence of a

The common law, in the absence of statutory or other regulations on the subject, requires that personal notice be given;<sup>1</sup> that it be in writing, and signed by the proper officer of the corporation;<sup>2</sup> that it contain the time and place of meeting, unless there be some standing rule or general custom, known to the members, fixing these things;<sup>3</sup> and state the business to be transacted, unless it is a general meeting for the transaction of business, or for a particular object provided for by the articles or by-laws of the corporation;<sup>4</sup> and it should be issued by some person having authority to call the meeting;<sup>5</sup> and if there is no officer by whom a meeting can be called, it has been held that the powers of the corporation are suspended until a new charter is obtained, or the legislature makes provision for a new mode of calling a meeting.<sup>6</sup> But this doctrine is questionable,

member from home will not, ordinarily, excuse a want of notice. *Jackson v. Hampden*, 20 Me. 37. But it has been held that the mental imbecility of a member will not render the proceedings of a corporate meeting invalid on account of a want of notice to him. *Stebbins v. Merritt*, 10 Cush. (Mass.) 27. The pledgee of stock is not generally entitled to notice. *McDaniels v. Flower Brook Manuf. Co.*, 22 Vt. 274. Where, by the records of a meeting, it appeared that a majority of the directors were present, it was held that it would be presumed that all had requisite notice. *Sargent v. Webster*, 13 Met. (Mass.) 497; *Lane v. Brainerd*, 30 Conn. 565. Nor can the validity of the acts of directors be collaterally questioned on the ground of a want of notice. *Chamberlain v. Painesville, &c. R. R. Co.*, 15 Ohio St. 225. If the articles of association or by-laws provide for the times and places of holding meetings, it would, undoubtedly, be the duty of members to take notice of the same; and if they prescribe the notice to be given, such notice as required as to the time and mode of service may undoubtedly be given, and this would be all that could be required. *People v. Batchelor*, 22 N. Y. 128. The time and place of meeting, it is claimed, may be fixed by usage, a tacit understanding of the members, or in other ways of which members may be required to take notice. *Atlantic Ins. Co. v. Sanders*, 36 N. H. 252.

<sup>1</sup> *Stevens v. Eden Meeting House Soc.*, 12 Vt. 688; *Wiggin v. Freewill Baptist Church*, 8 Met. (Mass.) 301; *Savings Bank v. Davis*, 8 id. 191; *Taylor v. Griswold*, 3 N. J. Eq. 222; *Rex v. Langhorn*, 6 N. & M. (N. C.) 203; *Stow v. Wyse*, 7 Conn. 214; *Bethany v. Sperry*, 10 id. 200.

<sup>2</sup> The summons must be from one having authority to issue the same. *Evans v. Osgood*, 18 Me. 213; *Stevens v. Eden Meeting House Soc.*, 12 Vt. 688; *Bethany v. Sperry*, 10 Conn. 200. See also in case of no officer authorized to give notice, *Goulding v. Clark*, 34 N. H. 148; *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 Allen (Mass.), 217; *Chamberlain v. Painesville, &c. R. R. Co.*, 15 Ohio St. 225. But it has been held that the notice need not be in writing, and that if the members are fully informed of meetings by parol, it is sufficient. *Wilc. on Corp.* 46; *Rex v. Hill*, 4 B. & C. 442.

<sup>3</sup> *Re British Sugar Refining Co.*, 3 K. & J. 408; 26 L. J. Ch. 369; *Graham v. Van Diemen's Land Company*, 1 H. & N. 541; 26 L. J. Ex. 73; *Re Irrigation Company of France*; *Fox's Case*, L. R. 6 Ch. 176; *Jones v. Milton & Rush T. Co.*, 7 Ind. 547; *Warner v. Mower*, 11 Vt. 385.

<sup>4</sup> *Sampson v. Bowdoinham Steam Mill Co.*, 36 Me. 78; *Warner v. Mower*, 11 Vt. 385; *Merritt v. Ferris*, 22 Ill. 303; *Brice's Ultra Vires*, 354.

<sup>5</sup> *Taylor v. Griswold*, 3 N. J. Eq. 222; *Evans v. Osgood*, 18 Me. 213.

<sup>6</sup> *Goulding v. Clark*, 34 N. H. 148.

and is not believed to be accurate as applied to railway corporations, as officers elected at a meeting called by any of the officers would at least be *de facto* officers, and no one but the State could question their authority; and the State would hardly be likely to seek the destruction of the franchises of a corporation for such a lapse. If neither the charter nor general law provides for the length of notice which shall be given, a reasonable notice is required; and if there is any general or special usage in that respect, it will be safe to follow it.<sup>1</sup> If the by-laws or charter do not fix the day on which the annual elections shall be held, the election should be held upon the recurrence in the following year of the day on which the first election was held, if that is a legal day;<sup>2</sup> if that day falls upon Sunday, then the election may be held upon the day preceding, as otherwise there would be an interregnum in which there would be no officers *de jure* of the corporation.

In the absence of any provision for the length of notice, a reasonable time is required, or the usual time, if a custom prevails.<sup>3</sup> Due

<sup>1</sup> *In re* Long Island R. R. Co., 19 Wend. (N. Y.) 37; *Wiggin v. Freewill Baptist Church*, 8 Met. (Mass.) 301.

<sup>2</sup> *Vandenburgh v. Broadway R. R. Co.*, 29 Hun (N. Y.), 348.

<sup>3</sup> *Wiggin v. Freewill Baptist Soc.*, 8 Met. (Mass.) 301; *Long Island R. R. Co., in rem*, 19 Wend. (N. Y.) 37; *Rex v. Hill*, 4 B. & C. 442. Upon this subject REDFIELD, J., in *Warner v. Mower*, 11 Vt. 385, observed: "It is to be borne in mind, too, that a manifest distinction obtains between general stated meetings of a corporation, and special meetings. I know that stated meetings may nevertheless be special; that is, limited to particular business. But stated meetings of a corporation are usually general; that is, for the transaction of all business within the corporate powers. Unless the object of such meeting is restricted by express provision of the by-laws, it would ordinarily be understood to be general; and so every corporator would be bound to understand it. But if the object of the meeting be limited by the by-laws, it is then a special meeting, and no other business could lawfully be transacted at such meeting, unless special notice was given. Where the meeting is stated and general,

no notice is required, either of the time or place of holding the meeting, or of the business to be transacted. Such is the general law of private corporations. But as all corporations are entities of the law merely, and exist and act solely in conformity to their charter and by-laws, it is obvious that the force and effect of every act of any particular corporation must depend mainly upon the charter and by-laws of that corporation. These are denominated the constitution and laws of the corporation, and, like every other constitution and all other laws, should receive such construction as to effect the probable intention of the framers. That intention must be judged of, as in other cases, by the words used in reference to the subject-matter and circumstances of each particular corporation. The charter of this corporation provides for the first meeting of the corporation specially, and that at that meeting, and at all other meetings legally notified they may make and alter such by-laws as may be thought necessary. There being thus no restriction in the charter in relation to meetings of the corporation or the business to be transacted, that subject will be governed exclusively by the by-laws. Those by-laws provide

notice of the time and place of a corporate meeting is by the English law essential to its validity, or its power to do any act which shall bind the corporation. Respecting notice, the courts in England adopted certain rules, which, since they form the basis of much of the statute law in this country upon the subject, and have in the main been followed by our courts, and are founded on reason, may advantageously be here mentioned. All corporations are presumed to know of the days appointed by the charter, statute, usage, or by-laws, for the transaction of particular business, and hence no notice of such meeting for the transaction of such business is necessary, or for the transactions of mere ordinary affairs of the corporation on such days; yet, if it is intended to proceed to any act of importance, a notice is necessary the same as at any other time. A notice, when necessary, must, if practicable, be given to every member who has a right to vote; it must be given by, or issued by order of, some one who has the authority to convene a corporate meeting. But notice may be altogether dispensed with, or its necessity waived, by the presence and consent of every one of those entitled to it. It must be served personally upon every resident member, or left at his house. If he is temporarily absent, it may be left with his family, or at his home or last place of abode.<sup>1</sup>

for an annual meeting of the corporation, to be holden at their counting room, on the first Wednesday in April of each year. Thus far the time and place of the meeting is fixed, and there being no restriction in regard to business, any and all business pertaining to the interest and powers of the corporation may be transacted. The annual meeting of all others is the one when, not only usually but always, *all* business is expected to be transacted. And the custom of a country is of great force in the construction of statutes as well as contracts."

<sup>1</sup> Dill. on Mun. Corp., §§ 200, 201. The notice must state the time of meeting, and the place, if it be not the usual place. It is not necessary to state what business is to be done when the meeting relates only to the ordinary affairs of the corporation; but when it is for the purpose of electing or removing officers, passing ordinances, and the like, the fact should be stated so that the members

may know that something more than the usual routine of business will be transacted. Such great importance is attached to notice that it can only be waived by universal consent; but if every member of a select body be present at a regular or stated meeting, they may, if every one consents, but not otherwise, transact any business, ordinary or extraordinary, though no notice was given, or an insufficient notice; but the unanimity of consent should plainly appear from their recorded declaration, acts, or conduct. This unanimity is only necessary to enter upon the business; once commenced, the rules which govern the body and its actions apply. 1 Dill. on Mun. Corp., § 202. The old English doctrine in relation to municipal corporations was, that where corporate acts were to be done, not on a charter day, and by a select body, there must be a summons of every member, except such as have absolutely deserted the town. Bac. Abr., tit. E., § 8.

The fact that a stockholder is absent from the State, so that a notice would be ineffectual, is held not to excuse a want of notice;<sup>1</sup> but mental imbecility, *which renders a stockholder incapable of receiving or acting upon a notice*, has been held a sufficient excuse for a failure to give him notice.<sup>2</sup> The notice must be given to the stockholder of record, and it is not sufficient if given to a mere assignee or pledgee of the stock, to whom no transfer has been made upon the books.<sup>3</sup> The election of directors at a meeting not properly notified cannot be questioned collaterally,<sup>4</sup> as third persons acting innocently, and trusting to the apparent title of an officer, are entitled to be protected against loss therefrom;<sup>5</sup> but as against the State there can be no such thing as an officer *de facto*, and the regularity of an election, in proper proceedings, can be inquired into,<sup>6</sup> and the election set aside, or the officers who were properly elected let into possession of all their functions and powers as such.<sup>7</sup>

**SEC. 135. Waiver of notice: Presumptions.**—The right to notice of a corporate meeting may be waived. If all the members assemble at any meeting and it proceeds to business, this is a waiver of notice, and the action of the body is not affected thereby.<sup>8</sup> In some cases notice will be presumed, in the absence of proof to the contrary. Thus, where it is shown by the records of a meeting of the directors of a corporation that a quorum was present, notice to the others will be presumed.<sup>9</sup> And it has been held that the validity of the acts of directors cannot be collaterally questioned on the ground of a want of requisite notice of the meeting to all the members of the board.<sup>10</sup> The regularity of notice is waived by the

<sup>1</sup> Jackson v. Hampden, 20 Me. 37.

<sup>2</sup> Stebbins v. Merritt, 10 Cush. (Mass.) 27. This rule would render it unnecessary to notify an insane stockholder. But *quere*, if he was under guardianship, &c.

<sup>3</sup> McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274.

<sup>4</sup> Johnston v. Jones, 23 N. J. Eq. 216; *In re* Long Island R. R. Co., 19 Wend. (N. Y.) 37; People v. Albany, &c. R. R. Co., 1 Lans. (N. Y.) 308.

<sup>5</sup> *Ex parte* Willcocks, 7 Cow. (N. Y.) 402; Boardman v. Halliday, 10 Paige Ch. (N. Y.) 223; Weeks v. Ellis, 2 Barb. (N. Y.) 325; People v. Albertson, 55 N. Y. 50.

<sup>6</sup> People v. Albany, &c. R. R. Co., *ante*,

<sup>7</sup> People v. Albany, &c. R. R. Co., *ante*.

<sup>8</sup> Rex v. Oxford, Palm. 453; Rex v. Chetwynd, 7 B. & C. 695; *Re* British Sugar Refining Co., 3 K. & J. 408; 26 L. J. Ch. 369; Samuel v. Holliday, 1 Woolw. (U. S. C. C.) 400.

<sup>9</sup> Sargent v. Webster, 13 Met. (Mass.) 497; Lane v. Brainerd, 30 Conn. 565; Middlesex, &c. Co. v. Davis, 3 Met. (Mass.) 133. And if the by-laws provide for the place of meetings and the records do not show that the meetings were at a different place, it would be presumed that the meetings were held at the place designated by the by-laws. McDaniels v. Flower Brook Co., 22 Vt. 274.

<sup>10</sup> Chamberlaine v. Painesville, &c. R. R. Co., 15 Ohio St. 225.



presence of *all* who have a right to attend a meeting.<sup>1</sup> But if one stockholder is absent, and does not subsequently assent to the action of the meeting, its proceedings are invalid.<sup>2</sup>

If one person is absent who has not received the required notice, or if present refuses his consent to the proceedings, they have been held invalid.<sup>3</sup> But a subsequent recognition by a member, of an agent appointed at a meeting held without giving a proper notice to him, has been held to be a waiver of such notice.<sup>4</sup> And it is well settled that where a board of directors of a corporation, formed for pecuniary profit, orders an act to be done, and the act is subsequently performed, its legality cannot afterward be questioned by any director or stockholder on account of the irregularity of the meeting, if he made no objection to the act at the time, or afterwards when he had an opportunity to do so.<sup>5</sup>

**SEC. 136. Adjourned Meetings.**—It is a general rule that corporate meetings may be adjourned; and if a corporate meeting is regularly called, any business that might have been lawfully transacted at the original meeting may also be done at the adjourned meeting. This is also in accordance with the general rule of parliamentary proceedings.<sup>6</sup>

<sup>1</sup> *Stebbins v. Merritt*, 10 Cush. 27; *People v. Peck*, 11 Wend. (N. Y.) 604; *Jones v. Milton Turnpike Co.*, 7 Md. 547. And in Ohio notice need not be given by those named in the original articles of association, for the purpose of incorporating under a general law. *Chamberlain v. Painesville, &c. R. R. Co.*, 15 Ohio St. 225. But if a notice is not given stating the time and place of an annual meeting, its action is illegal unless *all* the stockholders are present and consenting, either personally or by proxy. *San Buenaventura Mfg. Co. v. Vassalt*, 50 Cal. 534. If no notice whatever is given, and *all* the stockholders are present and participate in the action of the meeting without objection, they will afterwards be estopped from repudiating its action upon that ground. *In re British Sugar Refining Co.*, 3 K. & J. 408; *Rex v. Chetwynd*, 7 B. & C. 395; *Phosphate, &c. Co. v. Green*, L. R. 7 C. P. 43. And even if they were not present they may by their subsequent acquiescence in the action of the meeting be

bound thereby. *Turquand v. Marshall*, L. R. 4 Ch. 376; *Smallcombe v. Evans*, L. R. 3 H. L. 249; *Bryant v. Goodman*, 17 Pick. (Mass.) 228.

<sup>2</sup> *People's Ins. Co. v. Westcott*, 14 Gray (Mass.), 440.

<sup>3</sup> *People's Ins. Co. v. Westcott*, 14 Gray (Mass.), 440.

<sup>4</sup> *Bryand v. Goodman*, 5 Pick. (Mass.) 228.

<sup>5</sup> *Samuel v. Holliday*, Woolw. (U. S. C. C.) 400. See also *Leavitt v. Yates*, 4 Edw. Ch. (N. Y.) 134; *Bank of Alabama v. Comegys*, 12 Ala. 772; *Williams v. Christian Female College*, 29 Mo. 250; *Port of London Assurance Co. Case*, 35 Eng. L. & Eq. 178; *Hoyt v. Thompson*, 19 N. Y. 207.

<sup>6</sup> *Warner v. Mower*, 11 Vt. 385; *Smith v. Law*, 21 N. Y. 296. But no other business can legally be done at an adjourned meeting without special notice. *People v. Batchelor*, 22 N. Y. 128; *Farrar v. Perley*, 7 Me. 404; *Schoff v. Bloomfield*, 8 Vt. 472.

In a Vermont case<sup>1</sup> the court say: "It is too well settled to require comment that all corporations, whether municipal or private, may transact any business at an adjourned meeting which they could have done at the original meeting. It is but a continuation of the same meeting. Whether the meeting is continued without interruption for many days, or by adjournment from day to day, or from time to time, many days intervening, it is evident it must be considered the same meeting, without any loss or accumulation of powers."

In the absence of particular regulations on this subject, the power to adjourn a corporate meeting is an incidental common-law right, and adjournments may be made in the usual way to any future time, the same day or any other day, and even to another place than the one where it originally met, if within the territory of its creation.<sup>2</sup>

**SEC. 137. General and Special Meetings.** — The meetings of corporate bodies may be denominated general and special. The general meetings are usually fixed by the constitution or by-laws of the body, and occur at stated times and places; such as the usual annual or semi-annual meetings for the election of a board of directors and the transaction of other important business. Special meetings are such as are called on particular occasions, and for special purposes. They differ in respect to the notice required. In the former case, it is not necessary ordinarily that the notice should specify the business to be transacted, as members are required to take notice of it. But in the latter case, it would be necessary to particularly specify or call attention to the business to be transacted.<sup>3</sup> It has however been held that a notice of a meeting extraordinary in respect to the time of holding it need not specify the business if it is ordinary business.<sup>4</sup>

<sup>1</sup> Warner v. Mower, *ante*. See also, Smith v. Law, 21 N. Y. 296; People v. Batchelor, 22 id. 128; Farrar v. Perley, 7 Me. 404; Schoff v. Bloomfield, 8 Vt. 472; Field v. Field, 9 Wend. 394; Hudson Co. v. State, 24 N. J. L. 718; Insurance Co. v. Sanders, 36 N. H. 252; Rex v. Harris, 1 B. & Ad. 936.

<sup>2</sup> Chamberlain v. Dover, 13 Me. 466; People v. Martin, 5 N. Y. 22; Hubbard v. Winsor, 15 Mich. 146; Kimball v. Marshall, 44 N. H. 466; Goodell v. Baker, 8 Cow. (N. Y.) 286.

<sup>3</sup> People v. Batchelor, 22 N. Y. 128;

*id.* 146; Downing v. Ruger, 21 Wend. (N. Y.) 178; Burgess v. Pue, 2 Gill (Md.), 254; Stow v. Wyse, 7 Conn. 214; Smyth v. Darley, 2 H. of L. Cas. 789. In Cutbill v. Kingdom, 1 Exchq. 494, it is said that the meaning of a "special meeting" is, that the meeting shall not be convened unless the parties have notice of the purpose of the meeting. A meeting may be both general and special; general, for the purpose of doing general business, and special, for a particular purpose; then it becomes a general special meeting.

<sup>4</sup> Savings Bank v. Davis, 8 Conn. 191.

On the other hand, if the time is that fixed by the by-laws, but business of an extraordinary character is to be transacted, the notice should contain this special object.<sup>1</sup> And although a member is bound by the action of a majority in relation to matters coming within the scope of the authority of a general meeting, still he is not bound by a notice of a special meeting given to the attending members of such general meeting; for he would not reasonably expect a notice of that kind to be thus given.

A manifest distinction obtains between general stated meetings of a corporation and special meetings. Stated meetings may, nevertheless, be special, — that is, limited to particular business. But stated meetings of a corporation are usually general, — that is, for the transaction of all business within the corporate powers. Unless the object of the meeting is restricted by express provisions of the by-laws, it would ordinarily be understood to be general; and so every corporation would be bound to understand it. But if the object of the meeting is limited by the by-laws, it is then a special meeting, and no other business could lawfully be transacted unless special notice was given. Where the meeting is stated and general, no notice is required, either of the time or place of holding the meeting or of the business to be transacted.<sup>2</sup>

**SEC. 138. Majority at a Corporate Meeting may express the Corporate Will.** — Where no special provision is made in relation to the matter, a majority of those present may express the corporate will; and the whole body is bound by their acts, whether the number present be a majority of the whole number of members or not. The whole are not only bound by a majority of the members, but by a majority of those present at a lawful meeting. The majority of those who appear constitute a body capable of transacting business, in the absence of any limitation as to the number who may act.<sup>3</sup> And the will of the majority of the stockholders, who consti-

<sup>1</sup> *Zabriskie v. Railroad Co.*, 23 How. 381; *Sampson v. Bowdoinham Steam Mill Corp.*, 36 Me. 78; *People's Ins. Co. v. Westcott*, 16 Gray (Mass.), 440; *Atlantic Delaine Co. v. Mason*, 5 R. I. 463.

<sup>2</sup> REDFIELD, J., in *Warner v. Mower*, 11 Vt. 385.

<sup>3</sup> *Buel v. Buckingham*, 16 Iowa, 284; *Ex parte Willcocks*, 7 Cow. (N. Y.) 402; *People v. Tweddle*, 18 Hun (N. Y.), 427; *Junction R. R. Co. v. Reeve*, 15 Ind. 236; *Lockwood v. Mechanics', &c. Bank*, 9

R. I. 308; *Edgerley v. Emerson*, 23 N. H. 555; *Field v. Field*, 9 Wend. (N. Y.) 394; *Price v. Grand Rapids, &c. R. R. Co.*, 13 Ind. 58; *Despatch Line of Packet v. Bellamy*, 12 N. H. 205; *Craig v. First Presbyterian Church*, 88 Penn. St. 42; *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402; *Sargent v. Webster*, 13 Met. (Mass.) 497; *Cram v. Bangor House, &c.*, 12 Me. 354; *Monmouth, &c. Ins. Co. v. Lowell*, 59 id. 504.

tute members of the corporation, may adopt by-laws that shall direct and control the directors, who are but the agents of the corporation, appointed by the corporators. It is a common-law principle that if an act is to be done by an indefinite body, as the whole body of the corporators, it is valid if directed to be done by a majority of those present at a legal meeting, no matter how small a portion they may constitute of the whole number that may be entitled to be present, unless it is otherwise provided by law. But this is not the doctrine where a definite body, as a board of directors, is authorized to act.<sup>1</sup>

The rule may be said to be that when a meeting, at which a specified thing is to be done, is to consist of the different integral parts of a corporation, and each of these integral parts consists of a definite number of corporators, then the meeting will not be properly constituted unless it is attended by a majority of the members of each integral part respectively. Where an act is to be done by a select body, consisting of a definite number of corporators, it will not be valid unless a majority of the select body are in existence when the act is done. It is not necessary that they should all concur in the election, or other act done, but they must be present at the *meeting*. If the act is to be done by an indefinite body it is valid, if passed by a majority of those present at the meeting, however small a fraction they may be of the body at large.<sup>2</sup>

Where the records of a corporation show that a meeting was duly called, and that business was transacted at it, it will be presumed that a quorum was present;<sup>3</sup> and this is the rule also where the charter provides that two-thirds should be assembled for the transaction of business.<sup>4</sup>

**SEC. 139. Place of Meeting: Meetings held out of State.**— *All stockholders' meetings must be held in the State under whose laws the corporation is organized*, or according to the great weight of authority, all its proceedings are wholly void.<sup>5</sup> The question of the right of

<sup>1</sup> *Damon v. Granby*, 2 Pick. (Mass.) 345; *Commonwealth v. Ipswich*, id. 70; *Williams v. Lunenburgh*, 21 id. 75; *Church Case*, 5 Rob. (N. Y.) 649; *First Parish v. Sterns*, 21 Pick. (Mass.) 148; *State v. Binder*, 38 Mo. 450; *St. Mary's Church*, 7 S. & R. (Penn.) 517; *Presbyterian Cong. v. Johns*, 27 Miss. 517; *Gifford v. New Jersey R. R. Co.*, 10 N. J. Eq. 171; *Sprague v. Illinois River R. R. Co.*, 19 Ill. 174; *East Tenn. R. R. Co. v.*

*Gammon*, 5 Sneed, 567; *Horton v. Baptist Church*, 34 Vt. 316.

<sup>2</sup> *Rex v. Bellringer*, 4 T. R. 810; *Rex v. Morris*, 4 East, 17.

<sup>3</sup> *Citizens' Mutual Fire Ins. Co. v. Sortwell*, 8 Allen (Mass.), 217.

<sup>4</sup> *Com. v. Walpler*, 3 S. & R. (Penn.) 29.

<sup>5</sup> *Miller v. Ewer*, 27 Me. 517; *Ormsby v. Vermont Copper Mining Co.*, 56 N. Y. 623; *Aspinwall v. Ohio, &c. R. R. Co.*,

a corporation to hold strictly corporate meetings outside the State where they are created, was presented to the Supreme Court of Maine. The facts were as follows: A meeting of the incorporators was called to organize under its charter in the city of New York, at which meeting the charter was accepted and its officers elected; and the question presented was, whether the acts of the incorporators were lawful. The court say: "If the directors of the corporation legally chosen might transact business as such by a vote of the board, at a meeting held in another State, and might authorize persons to execute a conveyance of real estate, yet it would be necessary to show that such persons were legally chosen directors, before any conveyance made by their direction would be considered as legally made. All votes and proceedings of persons professing to act in the capacity of incorporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void. The directors of a corporation are not a corporate body when acting as a board, but a board of officers or agents; and they may exercise their powers as agents beyond the bounds where the corporation exists. Whether the statute provisions of this State and the intention of the legislative power, or the general rule of law respecting corporations be examined, the conclusion must be the same, — that this corporation could hold no meeting for the election of its officers, or for the regulation of its affairs without the limits of this State, and all such meetings and proceedings were without right or authority, and wholly void."<sup>1</sup>

The corporation can generally do no acts either within or without the State, except such as are expressly authorized by the organic law of its being, or can be fairly inferred from the powers granted; and the acts must be done in the manner and by the officers or agents indicated in such law. And if the organic law does not grant the authority, either expressly or by implication, to hold corporate meetings without the limits of the sovereignty creating it, it follows that they could not thus lawfully meet; and any acts or contracts attempted to be executed while thus met would be *ultra vires*,

20 Ind. 492; *Freeman v. Machias Water Power, &c. Co.*, 38 Me. 343; *Wood Hydraulic, &c. Co. v. King*, 45 Ga. 34; *Hilles v. Parish*, 13 N. J. Eq. 380.

<sup>1</sup> Per SHEPLEY, J., in *Miller v. Ewer*, 27 Me. 517. See also, *Freeman v. Machias Water Power, &c. Co.*, 38 Me. 343; *Aspinwall v. Ohio, &c. R. R. Co.*, 20 Ind. 497; *Ormsby v. Vermont Copper Mining*

*Co.*, 56 N. Y. 623; *Merrick v. Brainard*, 38 Barb. (N. Y.) 574; 34 N. Y. 208; *Smith v. Alvord*, 63 Barb. (N. Y.) 415; *New York Floating Derrick Co. v. New Jersey Oil Co.*, 3 Duer (N. Y.), 648; *Stoney v. American Life Ins. Co.*, 11 Paige Ch. (N. Y.) 635; *Bard v. Poole*, 12 N. Y. 495; *Wood Hydraulic, &c. Co. v. King*, 45 Ga. 34.

and absolutely void.<sup>1</sup> But there is a class of cases in which it is held that the proceedings of meetings held out of the jurisdiction are not absolutely void, but are merely voidable; and that the corporation is estopped from setting up the invalidity of the proceedings in defence;<sup>2</sup> and that parties who have contracted with the corporation, or recognized its acts, are also estopped from setting up such irregularity.<sup>3</sup> Where a corporation is created by the concurrent action of two or more States, inasmuch as it has a legal domicile in either of them, it follows as a matter of course that its corporate meetings may be held in either of them.<sup>4</sup>

SEC. 140. **Directors may hold Meetings out of the State.** — In the absence of statutory provisions, or conditions in the organic law of corporations, the almost uniform current of authority is, that the directors of corporations may hold meetings of the board outside the limits of the State where it was constituted.<sup>5</sup> The directors of a corporation are not the corporation itself, and if they meet without the State of their creation, their proceedings will be valid, for in this respect they are like the agents of a natural person.<sup>6</sup> Thus, where

<sup>1</sup> *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 587. See also *Hilles v. Parish*, 13 N. J. Eq. 380. It has been held in New York that the statute relative to the observance of Sunday does not apply to the proceedings of business meetings of corporate benevolent societies held on that day; and that such society meetings are not on that account illegal. *People v. Young Men's, &c. Soc.*, 65 Barb. (N. Y.) 357.

<sup>2</sup> *Heath v. Silverthorn, &c. Co.*, 39 Wis. 146.

<sup>3</sup> *Ohio, &c. R. R. Co. v. McPherson*, 35 Mo. 13.

<sup>4</sup> *Covington, &c. Bridge Co. v. Mayer*, 31 Ohio St. 317.

<sup>5</sup> *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 587. They are generally considered the agents of the corporation. Natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person by its agents, to make a contract within the scope of its limited

powers, in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place? The corporation must, no doubt, show that the law of its creation gave it authority to make such contracts through such agents. Yet, as in the case of natural persons, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the State of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place, and that it is permitted by the laws of the place to exercise there the powers with which it is endowed. Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no vested contract without their sanction, express or implied.

<sup>6</sup> *Ohio, &c. R. R. Co. v. McPherson*, 35 Mo. 13. Although another State cannot create a corporation in New York, yet, it is no objection to the corporate acts of a foreign corporation, done in New York, that they are authorized by a board

the directors of a corporation created in Vermont held a meeting in Massachusetts, and authorized the execution of a mortgage by an agent, and its validity was in question, the court said: "The conferring of authority by the directors of a corporation upon an agent to execute a deed is not a corporate act. The directors act in such a case, not as a corporation, but as the agents of and in behalf of the corporation. And this authority may be conferred by a vote passed at a meeting of the directors without the State where the corporation was created and exists. . . . We have no occasion now to discuss or decide whether a corporation created in one State can legally hold a corporate meeting and pass corporate votes in another. There certainly seem to be strong reasons for holding that they cannot act in a strictly corporate capacity where they have no legal existence. But we do not regard this conferring authority by the directors upon an agent, to execute a deed, as being a corporate act, any more than any and every other act or contract they do or make on behalf of the corporation. It is a mere question of authority in the directors, and not one of corporate power; and when it is established that the power is vested in the directors, it cannot with any more propriety be said that they are performing a corporate act in conferring it, than in every other matter where they bind the company by their official agency as directors. They act, in neither case, as the corporation, but as the agents of and in behalf of the corporation."<sup>1</sup>

of directors at a meeting held in the latter State, when the acts so done are not repugnant to the laws of the State. *Smith v. Alvord*, 63 Barb. (N. Y.) 415.

<sup>1</sup> *Arms v. Conant*, 36 Vt. 744. See also *Galveston R. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 476, in which a question arose as to the validity of a mortgage, made by a corporation, which was authorized at a meeting of the directors held out of the State. The court said: "It is next objected that the mortgages were not properly executed because the meeting of the directors by which the mortgages were authorized to be executed, was held in the city of New York. It is not denied that the mortgages were executed in good faith, under the corporate seal, and signed by the president, and countersigned by the treasurer of the company, and duly recorded in the proper offices of registry in the State of Texas. No doubt, it can be true in many cases that the extra-territorial acts of

directors would be held void, — as, where a set of directors of a New Jersey corporation met at Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain stocks. And other cases might be put where their acts would be held void without a prohibitory statute; and it is generally true that a corporation only exists within the territory of the jurisdiction that created it. But it is well settled that a corporation by its agents may make contracts and transact business in another territory, and may sue and be sued therein." A similar doctrine, under a similar state of facts, was held in *Wright v. Bundy*, 11 Ind. 404. The directors of a corporation are not the corporation itself, *but only the agents of the corporation*; and there is no reason why acts done by them in behalf of the corporation, although in their capacity of directors, should not be as binding as the acts of

A contract with a corporation cannot be void because executed out of the State of its creation, for, although it seems well settled that a corporation cannot as such and in its corporate capacity hold meetings or transact business out of the sovereignty of its creation, or migrate to another sovereignty and retain its legal existence as such, this does not prevent its directors or other agents from doing business within another sovereignty; for by the comity between States and nations they may sue and be sued, and may contract and be contracted with, through their agents, the same as natural persons. The place where the active agents of a corporation enter into a contract is immaterial. The important question is one of power, not of place. The exercise of power has relation to the place of their legal establishment, where the contract may be subsequently acted under. The meetings of directors of a business corporation are not analogous to the sessions of a judicial tribunal. The corporation is organized by the election of directors, but the mere organization of directors into a formal meeting for business afterward is quite a different thing. States cannot migrate, but by their agents they are daily making contracts without their territorial boundaries,<sup>1</sup> and to say that directors of an ordinary business corporation can do no lawful act outside of the jurisdiction under which the corporation is created, would make it necessary to shut them out from the transaction of their business, or the exercise of their functions in every other jurisdiction.

**SEC. 141. Jurisdiction in Equity to restrain.** — It is now a generally received doctrine that courts of equity have jurisdiction to enjoin corporate elections; and in the exercise of their legitimate functions, they have adapted their remedies to meet the requirements occasioned by the development of business interests, and the complications arising from the diversity therein; and in the exercise of their powers, they have assumed to control the elections of private corporations, where the principles of equity seemed to require it. This power of courts of equity has been recognized in this country, and a succession of decisions has firmly established the jurisdiction of the court.<sup>2</sup>

any other agents. *Ohio, &c. R. R. Co. v. McPherson*, 35 Mo. 13; *Coe v. N. Y. Midland R. R. Co.*, 30 N. J. Eq. 105. But see *Hilles v. Parish*, 30 N. J. Eq. 380; *Aspinwall v. Ohio, &c. R. R. Co.*, 20 Ind. 497; *Ormsby v. Vt. Copper Mining Co.*, 56 Vt. 623, for instances in which a

contrary doctrine was held; but in all these cases it will be seen that the statute of the jurisdictional State prohibited such meetings either expressly or by fair inference.

<sup>1</sup> *Wright v. Bundy*, 11 Ind. 404; *Merrick v. Van Santvoord*, 34 N. Y. 208.

<sup>2</sup> *Wright v. Bundy*, 11 Ind. 404;



SEC. 142. *Irregular meetings: Proceedings at Corporate Elections.*

— Where by statute, provision is made for the holding of annual meetings at a particular time, as the first Monday in January, etc., it is treated as directory merely, and if held at another time, although irregular, it does not render the election void, and the directors elected at such meeting can bind the corporation by their acts;<sup>1</sup> and even though the election is not strictly according to the requirements of the statute, it is treated as legal, if it is substantially so, or if the emergency was such as to justify a departure from the strict letter of the law.<sup>2</sup> Thus, in the case last cited, it was held that in an emergency in which the forms prescribed by the charter fail to accomplish the purposes contemplated, it is competent for the corporators to exercise the power of election, and provide for the appointment of inspectors for that purpose; and such election will not be set aside because the oath actually administered was not subscribed by the inspectors. But the departure must not be such as affects the fairness of the election, or as operates as a surprise or fraud upon the stockholders,—as, by opening the polls *before* the hour named in the notice.<sup>3</sup>

If the persons chosen as inspectors of the election are enjoined from acting, the stockholders at the time appointed may choose new

Haight v. Day, 1 Johns. Ch. (N. Y.) 18; Walker v. Devereaux, 4 Paige (N. Y.), 229 (1883); Campbell v. Poultney, 6 G. & J. (Md.) 94; Hilles v. Parish, 13 N. J. Eq. 380; Webb v. Ridgely, 38 Md. 364; Brown v. Pacific Mail Steamship Co., 5 Blatchf. (U. S. C. C.) 525. In the case of Walker v. Devereaux, above cited, Chancellor WALWORTH observes: "This court unquestionably has the power to prevent this election by an injunction operating upon the commissioners, restraining them from acting as inspectors of the election. And in a case of imperious necessity, where the complainant did not know and could not ascertain the names of the other stockholders, I might consider it my duty to prevent a great and irreparable injury to him, although the effect of that interference might be to destroy the charter of the corporation. But in the exercise of such a power the court should require ample security from the complainant to pay all damages other persons might sustain by

the granting of the injunction, if it should be subsequently ascertained that it was not warranted by the real facts of the case. The oath of the complainant that he is informed and believes the existence of a fact may be sufficient ground to authorize the issuing of an injunction against a defendant who has had an opportunity to deny the allegation if it is unfounded, but it is not sufficient to justify the court in destroying or injuring the rights of others who have not had an opportunity of being heard by themselves, or by those who are under a legal obligation to protect their rights." See also Reed v. Jones, 6 Wis. 680.

<sup>1</sup> Downing v. Potts, 23 N. J. L. 66; Nashua Fire Ins. Co. v. Moore, 55 N. H. 48; Hughes v. Parker, 20 id. 58.

<sup>2</sup> Wheeler's Case, 2 Abb. Pr. (N. Y.) n. s. 361.

<sup>3</sup> People v. Albany, &c. R. R. Co., 55 Barb. (N. Y.) 344; 1 Lans. (N. Y.) 308.

inspectors and proceed with the election.<sup>1</sup> If the statute excludes directors from acting as inspectors, this does not prevent other officers of the corporation from so acting.<sup>2</sup> In the absence of any provision in the statute to the contrary, it is not necessary that the inspectors should be stockholders, nor are they ineligible as candidates for an office to be filled by the election at which they act as inspectors.<sup>3</sup> If the time is not limited, the election may be adjourned from day to day;<sup>4</sup> nor even, although a resolution of the board limits the time for keeping the polls open to an hour, are the inspectors bound to close them within that time, but they may exercise a reasonable discretion in the matter<sup>5</sup> so as to give the stockholders an opportunity to vote.<sup>6</sup> The omission of the stockholders to vote for the whole number of directors, does not vitiate the election of those who have a majority of the votes;<sup>7</sup> and a new election will be ordered to fill the vacancy in the board.<sup>8</sup> The inspectors, after the close of the polls, have no power to pass upon the legality of votes which were received without objection.<sup>9</sup>

**SEC. 143. Rule as to Proxies: Powers of Inspectors: Evidence of Right to Vote: Directors qualified as Stockholders, when.** — A stockholder who desires to vote on his stock by proxy is bound to furnish his agent with such written evidence of the latter's right to act for him as will reasonably assure the inspectors that the agent is acting by the authority of his principal. But the power of attorney need not be in any prescribed form, nor be executed with any particular formalities. It is sufficient that it appear on its face to confer the requisite authority, and is free from all reasonable grounds of suspicion of its genuineness and authenticity; and the court, in reviewing the proceedings at an election, must be satisfied that the inspectors had reasonable grounds for rejecting the proxy.<sup>10</sup> If votes are cast for a candidate who is ineligible for the office of director, they will not be thrown away, so as to elect a candidate having a minority of votes, *unless the electors casting such votes had knowledge of the*

<sup>1</sup> *People v. Albany, &c. R. R. Co., ante.*

<sup>2</sup> *Ex parte Chenango Co. Mut. Ins. Co., 19 Wend. (N. Y.) 685.*

<sup>3</sup> *Ex parte Willcocks, 7 Cow. (N. Y.) 402.*

<sup>4</sup> *Ex parte Chenango Co. Mut. Ins. Co., ante.*

<sup>5</sup> *Ex parte Mohawk, &c. R. R. Co., 19 Wend. (N. Y.) 135.*

<sup>6</sup> *People v. Albany, &c. R. R. Co., ante.*

<sup>7</sup> *Ex parte Excelsior Ins. Co., 38 Barb. (N. Y.) 387.*

<sup>8</sup> *Ex parte Union Ins. Co., 22 Wend. (N. Y.) 591.*

<sup>9</sup> *People v. White, 11 Abb. Pr. (N. Y.) 168.*

<sup>10</sup> *See Matter of Cecil, 36 How. Pr. (N. Y.) 477.*

*fact on which the disqualification of the candidate for whom they voted rested, and also knew that the latter was for that reason disabled by law from holding the office.*<sup>1</sup> Inspectors of an election for directors are required to decide upon the admissibility of the votes that are offered, but they have no power to pass upon the eligibility of the persons for whom votes are proposed to be cast. The question of eligibility is one that can be raised only in the courts.<sup>2</sup> The general rule is that the books of the corporation afford the only evidence as to who are entitled to the rights and privileges of stockholders in the management of the affairs of the corporation. If the statute requires that a director shall also be a stockholder, the books of the corporation are the only evidence as to who are stockholders, and as such are entitled to vote at elections; but with respect to the qualifications of a director, the company's books are not conclusive. A person may be qualified to be a director whose vote cannot be received at the election, by reason of the transfer of stock to him not being entered on the books; and he may appear as a stockholder on the books, and still be disqualified for the office of director for reasons *aliunde*; and if the stock was legally issued, and the legal title is in the stockholder, he is *prima facie* capable of being a director; and his right to be a director, in virtue of his legal title to such stock, can be impeached only by showing that the title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company.<sup>3</sup> In an English case,<sup>4</sup> the articles of association provided that every member should be entitled to one vote for every ten shares, but should not be entitled to more than one hundred votes in all, and that no member should vote at any general meeting unless he had been possessed of his shares for three months previously thereto. It was held that the register of shareholders was the only evidence by which the right to vote could be ascertained, and that no votes of shareholders appearing on the register and properly qualified, should be rejected on the ground that their shares had been transferred to them by other shareholders, for the purpose of increasing their own voting power, or with an object

<sup>1</sup> *Regina v. Coaks*, 3 E. & B. 248; *Regina v. Tewkesbury*, L. R. 3 Q. B. 628; *Drinkwater v. Deakin*, L. R. 9 C. P. 626; *Etherington v. Wilson*, L. R. 20 Eq. 606.

<sup>2</sup> *DEPUE, J.*, in matter of *St. Lawrence Steamboat*, 44 N. J. L.

<sup>3</sup> *DEPUE, J.*, in matter of *St. Lawrence Steamboat*, 44 N. J. L.

<sup>4</sup> *Pender v. Lushington*, L. R. 6 Ch. Div. 70.

alleged to be adverse to the interests of the company, or on the ground that the holders were not beneficial owners of the shares. So also it is held that a person has a right to vote on stock standing in his name as trustee for another, or on stock which he has pledged or hypothecated, if it be in his own name on the company's books, and that inspectors of the election, in determining the qualifications of voters, have no authority to inquire whether the person who appears by the books to be a stockholder, is or not the real owner of the stock standing in his name. They must take the company's books as conclusive evidence as to the qualification to vote.<sup>1</sup> And the real question in such case is whether he is the legal owner of stock of the corporation.<sup>2</sup>

SEC. 144. **Controverted Elections.** — The regularity of a corporate election can only be tested by proceedings by *quo warranto*, or where the statute has made provision therefor by special proceedings, by such proceedings as the statute provides.<sup>3</sup> Where the statute provides a special remedy for such cases, the statutory method should be strictly pursued; and in such cases provision is usually made, not only that the court may oust the illegal officers, but also that they may put those legally elected into the office;<sup>4</sup> but in *quo warranto* proceedings, the court can only render a judgment of ouster, and cannot put the officers legally elected into power, but leaves the matter to a new election.<sup>5</sup> Being a proceeding in the name of the State, and criminal in form although civil in its nature, the granting of the writ is discretionary, and can only be granted in the State in which the corporation is domiciled.<sup>6</sup> The issue may be tried by jury.<sup>7</sup> An election will not be set aside for mere informality, where the wishes

<sup>1</sup> *Ex parte Willcocks*, 7 Cow. (N. Y.) 402; *People v. Kipp*, 4 id. 382, n.; *People v. Tibbetts*, id. 358; *In re Barker*, 6 Wend. (N. Y.) 509; *In re Wheeler*, 2 Abb. Pr. (N. Y.) n. s. 361.

<sup>2</sup> *Matter of St. Lawrence Steamboat Co.*, 44 N. J. L.

<sup>3</sup> *Hudson River, &c. R. R. Co. v. Kay*, 14 Abb. Pr. (N. Y.) n. s. 191; *Miller v. State*, 15 Wall. (U. S.) 478; *State v. McDaniel*, 22 Ohio St. 354; *Owen v. Whitaker*, 20 N. J. Eq. 122; *Hoppin v. Buffum*, 9 R. I. 513. A court of equity will not entertain a bill to test the title of officers of a corporation to the office; but in a case where it has jurisdiction for other purposes, and it becomes necessary

to do so for the purposes of the suit, it will for that purpose pass upon the title, but its decree will not oust the officers, or finally affect the real question as to the validity of their election. *Johnston v. Jones*, 23 N. J. Eq. 216; *Pond v. Vt. Valley R. R. Co.*, 12 Blatchf. (U. S. C. C.) 280.

<sup>4</sup> *People v. Albany, &c. R. R. Co.*, 1 Lans. (N. Y.) 308.

<sup>5</sup> *People v. Phillips*, 1 Den. (N. Y.) 388; *State v. McDaniel*, 22 Ohio St. 354.

<sup>6</sup> *State v. Smith*, 48 Vt. 266; *State v. McDaniel*, *ante*.

<sup>7</sup> *People v. Albany, &c. R. R. Co.*, *ante*.

of the corporators have been fairly expressed ;<sup>1</sup> nor simply because illegal votes were cast, if they do not affect the result ;<sup>2</sup> nor because legal votes were erroneously rejected, if they would not have changed the result of the election if received.<sup>3</sup>

SEC. 145. **Holding of Election may be compelled by Mandamus.** — Where the officers neglect or refuse to order or call an annual election, or a special election when necessary, they may be compelled to do so by *mandamus* ;<sup>4</sup> and this also is the proper remedy upon petition by the corporation to compel officers illegally in possession of the books, papers, and property of a corporation, to deliver them up to the lawful officers, although such illegal officers are in possession under a claim of right, and are exercising the functions of their offices, where they have usurped the office by means of illegal votes ;<sup>5</sup> but this remedy can only be resorted to where the return to the writ will merely involve a question of law,<sup>6</sup> and there is no other adequate legal remedy.

SEC. 146. **What Officers may be Elected.** — If the charter or general law is silent upon the point as to what corporate officers shall be elected, the by-laws may regulate the matter. But in reference to business corporations, the right of the stockholders to elect the directors of the corporation is inherent, as it is only through them that they can express their wishes as to the management of the corporation.<sup>7</sup> Generally, the charter or the general law provides what officers a corporation shall have, and specifies their general duties, and sometimes their qualifications ; but where the statute fails to do so, both the class and qualifications and general duties of officers may be determined by the corporation itself. While public policy, except in rare and exceptional instances,<sup>8</sup> would seem to require that the directors of a corporation should have an interest in the corporation as stockholders, yet it is held that where the statute does not so provide, the discretion of stockholders in electing directors

<sup>1</sup> Phillips v. Wickham, 1 Paige Ch. (N. Y.) 590.

<sup>2</sup> *Ex parte* Chenango Co. Mut. Ins. Co., *ante*.

<sup>3</sup> People v. Phillips, 1 Den. (N. Y.) 388; *Ex parte* Long Island R. R. Co., 19 Wend. (N. Y.) 37.

<sup>4</sup> State v. Wright, 10 Nev. 167; Owen v. Whittaker, 20 N. J. Eq. 122; People v. Albany Hospital, 61 Barb. (N. Y.) 397.

<sup>5</sup> American Railway Frog Co. v. Ha-

ven, 101 Mass. 398; Melvin v. Haitt, 52 N. H. 61; State v. Gall, 32 N. J. L. 285.

<sup>6</sup> Howard v. Gage, 6 Mass. 462.

<sup>7</sup> Burrill v. Nahant Bank, 2 Met. (Mass.) 196; Perkins v. N. Y. Central R. R. Co., 24 N. Y. 196; Steinwig v. Erie R. R. Co., 43 id. 123.

<sup>8</sup> As where the State is a stockholder, and has authority to name or appoint a certain number of directors. Wight v. Springfield, &c. R. R. Co., 117 Mass. 226.

is not limited to persons owning stock;<sup>1</sup> and a by-law or resolution passed by the directors, which has not been confirmed by the stockholders, providing for such a qualification, does not change the rule or prevent the stockholders from electing a non-stockholder as director.<sup>2</sup> If by statute, the holding of stock is made a necessary qualification, the fact that he is a stockholder when he enters upon the discharge of his duties as such, is sufficient, although he was not a stockholder when elected;<sup>3</sup> and if he appears to be a stockholder of record, it is sufficient, although he is not the real owner of the stock.<sup>4</sup> But it has been held that where the charter requires that a director should be a stockholder, a person who is not in fact a stockholder, but fraudulently and collusively took the transfer of a share, in which he in fact had no property interest, in order to qualify himself for the position of director, is not thereby rendered eligible for the office;<sup>5</sup> and there can be no question as to the soundness of this doctrine, because both the letter and spirit of a statute are to be regarded, and while such a transaction comes within the letter, it is clearly against the spirit of the statute, and a mere evasion of its requirements. But it is held that where one is appointed a director by the articles of association, which provide that no person shall be eligible to the office of director unless he owns a certain number of shares, the person so appointed is eligible although he holds a less number than required, because the provision only relates to persons thereafter to be appointed or elected.<sup>6</sup> Nor, where a person owns the requisite number of shares, is his eligibility defeated by a mortgage or pledge thereof.<sup>7</sup>

**SEC. 147. Election of Directors.**—The directors and other elective officers of a corporation must be chosen in the manner required by the charter, or the general law under which the corporation is

<sup>1</sup> *State v. McDaniel*, 22 Ohio St. 354; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205. In the absence of any provision in the statute or by-laws to the contrary, there is no reason why a woman, married or single, may not be a director of a corporation. *People v. Webster*, 10 Wend. (N. Y.) 554.

<sup>2</sup> *In re British Provident Life, &c. Association*, L. R. 5 Ch. Div. 306.

<sup>3</sup> *Kanuth's Case*, L. R. 20 Eq. 506.

<sup>4</sup> *State v. Ferris*, 42 Conn. 560. If the charter or by-laws provide that any person who ceases to be a stockholder

shall cease to be a director, this, by necessary inference, renders a person who is not a stockholder ineligible to the office. *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205. A treasurer of a corporation may also be a director. *Sargent v. Webster*, 13 Met. (Mass.) 497, and so may a married woman. *People v. Webster*, 10 Wend. (N. Y.) 554.

<sup>5</sup> *Bartholomew v. Bentley*, 1 Ohio St. 37.

<sup>6</sup> *Llanhanny Hematite Iron Co.*, 38 L. J. N. s. 731.

<sup>7</sup> *Cummings v. Prescott*, 2 Y. & C. 488.

organized; and even where the charter or general law does not designate the length or kind of notice to be given of the time and place of the meeting for such election, it is obvious that a reasonable notice to all the stockholders would be required, unless *all* the stockholders were present and gave their assent, either personally or by proxy. And this is the case even in relation to *annual* meetings, and although the by-laws fix the time and place of such meeting.<sup>1</sup> If the meeting is required to be called by the clerk, in a certain way, he alone has the power to call it, unless provision is made for it being called by some other officer in the case of the disability or failure of the clerk to call it, and the mode specified must be adopted. Thus, where notice of an election was required to be given by the *directors* of a corporation, it was held that a notice signed by a majority of the directors, not stating that it was by the order of the board, and not stating that the persons who signed the call *were directors*, was not sufficient, and could not be the basis of a legal meeting.<sup>2</sup> In the case last cited, the strictness of this rule was well illustrated, and it was held that where the directors of a corporation are empowered to designate the time for holding an election, such designation *must be by the board when lawfully convened*; and a determination by the board or a majority of the directors that an election must be held, without fixing a time, does not authorize one of them to fix the time and give notice for such time. It was also held that, when a charter directs that all elections of directors after the first shall be held annually, at such times as the by-laws shall direct, *no second election can be held until by-laws designating the time have been adopted*. The notice for an annual or other meeting of the corporation must designate the day, hour, and place where it is to be held; and the meeting cannot be held until the hour designated in the notice, nor at any other place, unless regularly adjourned. Thus, in a New York case,<sup>3</sup> a part of the stockholders of a corporation met fifteen

<sup>1</sup> *San Buenaventura, &c. Mfg. Co. v. Vassault*, 50 Cal. 534; *People v. Albany, &c. R. R. Co.*, 55 Barb. 344.

<sup>2</sup> *Johnston v. Jones*, 23 N. J. Eq. 216.

<sup>3</sup> *People v. Albany, &c. R. R. Co.*, 55 Barb. 344. Where the stockholders of a corporation were notified that the annual meeting for the election of directors would be held at a certain hour of the day fixed by the charter, and the corporation was restrained from holding an election on

that day, in consequence of which no meeting was held until several hours after the time fixed in the notice, when a small number of stockholders, without the knowledge of the others, met, organized, and adjourned until the next day, at which time an election was held by a minority of the stockholders, without notice to others, who were in the vicinity for the purposes of the meeting, and might have been readily notified, — it was held that such election was invalid, whether

minutes before the hour for which an election was appointed, and organized as a meeting of the corporation, and chose inspectors, and precisely at the hour, as they claimed, they adopted resolutions to proceed with the election, and confirmed the selection of inspectors, and thereupon held an election; while another party of stockholders, in another room, at or shortly after the hour appointed, organized as a meeting of the corporation, appointed inspectors, and proceeded also to an election. It was held that the proceedings at the former meeting operated as a surprise and fraud upon the stockholders who did not participate in the meeting, and as to them was irregular and void; and such irregularity could not be cured by a reorganization of the meeting at the proper time, where such meeting was in fact, and in legal effect, but a continuation of the first meeting. The election at the second meeting was held valid, although the polls were kept open somewhat longer than the time fixed by the notice, it appearing that such action was fairly within the exercise of a reasonable discretion, and for the purpose of giving the stockholders a fair opportunity to vote. None but *bond fide* stockholders, or persons holding the proxies of stockholders, can vote at an election of officers of a corporation; and if the list of stockholders exhibited and voted upon at such election was not a *true* list of the stockholders, and was made up fraudulently, and contained the names of persons not entitled to vote, the election is not legal.<sup>1</sup> Where a meeting is legally convened for that purpose, unless the charter, statute, or by-laws otherwise provide, the persons receiving a majority of all the votes cast, although less than one-half the stock was represented, are legally elected as directors, and clothed with all the functions and powers, as well as duties and liabilities of that office.<sup>2</sup>

SEC. 148. *De facto* Directors. — While, as stated, a person who is ineligible to the office of director, or whose election was irregular cannot be a director *de jure*, yet he does by his election become a director *de facto*, if he enters upon the discharge of his duties; and,

the restraining order did or did not bind the stockholders. *State v. Bonnell*, 35 Ohio St. 10.

<sup>1</sup> *Johnston v. Jones*, *ante*. But see *People v. Albany, &c. R. R. Co.*, *ante*, where it was held that a by-law of a corporation requiring that on an election day the secretary should produce the transfer books and a list of the stockholders entitled to vote, etc., and that inspectors

should be chosen from among the stockholders, is directory; and an omission to produce the books does not invalidate the election, although it casts the burden of proof upon the parties claiming under it, to show that voters challenged were, or appeared by the books to be, entitled to vote.

<sup>2</sup> *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525.



if the corporation permits him to act as such, it is bound by all his acts within the scope of the powers of a director *de jure*.<sup>1</sup> A court of equity will not entertain a bill by shareholders in an incorporated company to restrain directors *de facto* from acting as such, on the sole ground of the alleged invalidity of their title to their offices.<sup>2</sup> Nor will a court of law permit the legality of acts of *de facto* directors to be questioned. Thus, in an action for calls, the defendant applied to set aside the proceedings on the ground that the action had been brought without authority, as the company had ceased to exist. It was held that as the cause had been set down for trial, and the defendant had known the facts for a long time, the application was too late; and that as the persons authorizing the action had for some time acted as directors, the validity of their appointment could not be questioned on such an application.<sup>3</sup> Nor can a stockholder in a corporation, which has exercised all the functions and franchises contemplated by its charter for more than a year, set up in defence to a suit by the corporation for an assessment upon his stock, that the board of directors by whom the assessment was made having been elected beyond the limits of the State by which the charter was granted, the call was illegal. The directors were such *de facto*, and the legality of their election cannot be inquired into collaterally without showing a judgment of ouster against them in a direct proceeding by the government for that purpose.<sup>4</sup>

Directors holding over after the expiration of their term because no successors have been chosen are directors *de facto*, unless the statute expressly provides that their offices shall become vacant on the expiration of their term.<sup>5</sup> But even where the charter provides that

<sup>1</sup> Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205; Eakright v. Logansport, &c. R. R. Co., 13 Ind. 404; People v. Hills, 1 Lans. (N. Y.) 202; Clarke v. Thomas, 34 Ohio St. 46; Nashua Fire Ins. Co. v. Moore, 55 N. H. 48; Chamberlain v. Painesville, &c. R. R. Co., 15 Ohio St. 225; Mechanics' National Bank v. Burnett Mfg. Co., 33 N. J. Eq. 236; Ohio, &c. R. R. Co. v. McPherson, 35 Mo. 13; Hughes v. Parker, 20 N. H. 58; Penobscot, &c. R. R. Co. v. Dunn, 39 Me. 587; Atlantic, &c. R. R. Co. v. Johnston, 70 N. C. 348; Bucksport, &c. R. R. Co. v. Buck, 68 Me. 81; Cincinnati, &c. R. R. Co. v. Danville, &c. R. R. Co., 75

Ill. 113; Cabill v. Kalamazoo Mutual Ins. Co., 2 Doug. (Mich.) 124; Morrill v. Boston, &c. R. R. Co., 58 N. H. 68; Macon, &c. R. R. Co. v. Vason, 57 Ga. 314.

<sup>2</sup> Mozley v. Alston, 1 Phill. 790.

<sup>3</sup> Thames Haven Dock, &c. Co. v. Hall, 3 Eng. Railw. Cas. 441.

<sup>4</sup> Ohio & Mississippi R. R. Co. v. McPherson, 35 Mo. 13.

<sup>5</sup> Penobscot, &c. R. R. Co. v. Dunn, 39 Me. 587; Thornton v. Gould, 59 Ala. 461. But in People v. Tweddle, 18 Hun (N. Y.), 427, it was held that where the statute provides for an annual election, and evidently contemplates that the office shall become vacant at the end of

the directors shall hold their office until others are elected, yet if a long period of time elapses during which the corporation exercises no corporate acts, and the directors discharge no duties as such, it is held that their functions and powers as directors cease. Thus, in an Ohio case,<sup>1</sup> the charter of a bank provided that the directors should remain in office until their successors should be elected. An election for officers took place at a time when the corporation was insolvent, and for sixteen years no corporate acts were performed. It was held that the directors so elected could not be deemed to have continued in office during that entire period, and that the circumstance that they refrained for so long a period from performing any duty, was equivalent to an abandonment or resignation of the office.<sup>2</sup> But the fact that a director becomes bankrupt does not render his office vacant, even though he ceases to act as such, *unless it is shown that he has vacated his office*,<sup>3</sup> or the statute or charter provides that for such reason the office shall become vacant. It is sufficient to show that certain persons were acting as directors, in an action to restrain their illegal action, and it is not necessary to prove that they are directors *de jure*.<sup>4</sup> Where there are conflicting boards of directors, *de facto* directors in possession of the franchises of the corporation may maintain trespass for any injury to the corporate property, and their acts cannot be collaterally impeached.<sup>5</sup>

SEC. 149. **Acceptance by.** — The election of a person as director does not necessarily make him so, unless he has in some manner signified his acceptance of the office.<sup>6</sup> But where no qualification, such as taking an oath, etc., is necessary, and there is no usage to control, it will be presumed that he accepts the office, unless he

the year, and the corporation having power to do so, neglects to make any provision for the officers holding over, the office becomes vacant by the expiration of their term. In *South Meadow Dam Co. v. Gray*, 30 Me. 547, it was held that a clerk of a corporation continues in office after his term expires, and until his successor is appointed, unless the statute otherwise provides.

<sup>1</sup> *Bartholomew v. Bentley*, 1 Ohio St. 37.

<sup>2</sup> See also *Ross v. Crockett*, 14 La. An. 811, as to what constitutes evidence of an abandonment of the office of director or trustee.

<sup>3</sup> *Phelps v. Lyle*, 10 Ad. & El. 113.

<sup>4</sup> *Morrill v. Boston & Maine R. R. Co.*, 58 N. H. 68.

<sup>5</sup> *Atlantic, &c. R. R. Co. v. Johnston*, 70 N. C. 348; *Atlantic, &c. R. R. Co. v. Sharpe*, 70 id. 509.

<sup>6</sup> *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige Ch. (N. Y.) 127. Where the records of a corporation show that a certain person was elected a director at an annual meeting, it is competent to show that at a subsequent meeting of the directors he was present and participated in its action, as *prima facie*, although not conclusive evidence that he accepted the office. *Blake v. Bagly*, 16 Gray (Mass.), 531.

expressly declines it.<sup>1</sup> This presumption, however, may be rebutted, and perhaps simple non-action for five months would be sufficient to rebut it in some cases. But in the case last cited, where the stockholders of a bank, in an instrument authorizing its conversion from a State to a national bank, named all the directors who had been elected at the last annual election as those "who are now the directors of said bank," the court would not hold that two of those so named were not directors at the time of such conversion because they had never acted in that capacity since their election five months previously. Such an instrument may be invalid in so far as it is intended to operate as a reappointment, but considered as a recognition of the status of such non-acting directors, it is none the less significant.<sup>2</sup>

In an English case,<sup>3</sup> it was held that an injunction would lie to restrain provisional directors who have, without authority from the plaintiff, published a prospectus stating that he was a trustee, from using his name in connection with the company. Even where a person who has been elected a director has acted as such upon one occasion, he may by notice to the company resign or withdraw from the position. Thus, a person on being invited to become a director in a banking company consented, provided he should be satisfied that a certain proportion of the capital had been subscribed, and that certain persons named in the prospectus as directors would actually become such. He attended one meeting of the direction, and joined in signing a check with another director; but on receiving a few days afterwards, a letter of allotment of the shares necessary to qualify him, at once returned it, declining to act as director, as he was not satisfied upon the two points stipulated by him, or to receive the shares. The secretary wrote back, saying that his resignation had been accepted. It was held that he was not liable as contributory.<sup>4</sup>

SEC. 150. *Relation of Directors to Stockholders.* — Toward the stockholders, the directors, although not technically trustees, stand in a fiduciary relation, and their private interests must yield to their duty whenever they conflict.<sup>5</sup> They may be said to be *quasi* trus-

<sup>1</sup> Lockwood v. Mechanics' National Bank, 9 R. I. 308.

<sup>2</sup> Lockwood v. Mechanics' &c. Bank, ante.

<sup>3</sup> Routh v. Webster, 10 Beav. 561.

<sup>4</sup> Re Peninsular, &c. Bank (Austin's Case), 2 L. R. Eq. Cas. 435.

<sup>5</sup> Butts v. Wood, 38 Barb. (N. Y.) 181; In re German Mining Co., 27 Eng. L. & Eq. 158. In York, &c. Railw. Co.

tees, but are not trustees in the technical sense of the term, although frequently called so in the cases, because they do not take the title to the property; but they do occupy—so far as the stockholders, the company, and its creditors are concerned—such a fiduciary relation that they will not be permitted either directly or indirectly to acquire any adverse interest in the property, or to derive any peculiar profit or advantage therefrom, without the consent of the company expressly or impliedly given.<sup>1</sup> The trust is not express or

*v. Hudson*, 16 Beav. 495, the court says: "The directors of a corporation are the persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. A resolution by the shareholders, therefore, that shares, or any other species of property, shall be placed at the disposal of the directors, is a resolution that it shall be at the disposal of trustees; in other words, that the persons entrusted with that property shall dispose of it within the scope of the functions delegated to them in the manner best suited to benefit their *cestuis que trustent*. To construe these words as importing a gift to the directors for their individual advantage, or as investing them with a secret and irresponsible trust, is impossible, unless they are coupled with clear and unambiguous expressions to that effect. In the absence of any such expressions, not only the obligation of discharging the duty lies upon the persons accepting the trust, but also the further obligation of accounting for their discharge of it to their *cestuis que trustent* whenever required." *N. Y. & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592; *Cumberland, &c. Co. v. Parish*, 42 Md. 598; *Barnes v. Brown*, 80 N. Y. 527; *First National Bank v. Gifford*, 47 Iowa, 575; *Cook v. Berlin Woollen Mill Co.*, 43 Wis. 433; *Blake v. Buffalo, &c. R. R. Co.*, 56 N. Y. 485; *Erlanger v. New Sombrero, &c. Co.*, L. R. 3 App. Cas. 1218; *Covington, &c. R. R. Co. v. Bowler*, 9 Bush (Ky.), 468; *Farmers' &c. Bank v. Downy*, 53 Cal. 466.

<sup>1</sup> *Drury v. Cross*, 7 Wall. (U. S.) 302; *Hale v. Bridge Co.*, 8 Kan. 466; *Jackson v. Ludeling*, 21 Wall. (U. S.) 616; *Wood*

*v. Dummer*, 3 Mas. (U. S.) 308; *Flint, &c. R. R. Co. v. Dewey*, 14 Mich. 477; *San Francisco, &c. R. R. Co. v. Bee*, 48 Cal. 398; *Buel v. Buckingham*, 16 Iowa, 284; *Butts v. Wood*, 37 N. Y. 317; *Heath v. Erie R. R. Co.*, 8 Blatchf. (U. S. C. C.) 347; *Koehler v. Black River Falls Co.*, 2 Black (U. S.), 715; *Port v. Russell*, 36 Ind. 60; *United Society of Shakers v. Underwood*, 9 Bush (Ky.), 617; *Goodin v. Cincinnati, &c. Canal Co.*, 18 Ohio St. 169; *European, &c. R. R. Co. v. Poor*, 59 Me. 277; *Richard v. N. H. Ins. Co.*, 43 N. H. 283; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Covington, &c. R. R. Co. v. Winslow*, 9 Bush (Ky.), 468; *Davison v. Seymour*, 1 Bosw. (N. Y.) 88; *Hoffman Steam Coal Co. v. Cumberland Coal Co.*, 16 Md. 456; *Redmond v. Dickenson*, 9 N. J. Eq. 507; *Mussina v. Goldthwaite*, 34 Tex. 125; *Scott v. DePeyster*, 1 Edw. Ch. (N. Y.) 513; *Peabody v. Flint*, 6 Allen (Mass.), 52; *Hodges v. N. E. Screw Co.*, 1 R. I. 312; *Blake v. Buffalo Creek R. R. Co.*, 56 N. Y. 485; *Black v. Del. & Raritan Canal Co.*, 24 N. J. Eq. 463; *Gray v. N. Y. & Virginia, &c. Co.*, 3 Hun (N. Y.), 383; *Coleman v. Second Av. R. R. Co.*, 38 N. Y. 201; *Bliss v. Matteson*, 45 id. 22; *Conro v. Port Henry Iron Works*, 12 Barb. (N. Y.) 64; *Fremont v. Stone*, 42 id. 169; *Cumberland Coal Co. v. Sherman*, 20 Md. 117; *Ogden v. Murray*, 39 N. Y. 202. The president of a corporation taking an assignment of a contract entered into with the corporation, for the construction of its road, acts as trustee of the corporation and its stockholders, and not as the contractor's assignee. *Risley v. Indianapolis, &c. R. R. Co.*, 1 Hun (N. Y.), 202. In *Jackson v. Ludeling*, 21 Wall. (U. S.) 616, the court say: "The managers and

continuing, but ceases with their term of service, both as to the stockholders and the creditors of the corporation; and if they are re-elected a new trust is created, and the old one is not thereby continued; and when the trust ceases, the statute of limitations begins to run, and may be pleaded in equity as well as at law.<sup>1</sup> But if there is no interregnum in the office, — as, if the directors or any of them are re-elected before their term expires, — the trust continues without interruption. If only a part of the directors are re-elected, the trust is continued so far as they are concerned and the new directors assume the trust thrown off by those who go out of the board.

The true and exact relation of directors to the stockholders has by no means been well defined by the courts. In many of the cases they are said to be trustees, but an examination of the cases generally discloses that this term is applied to them only in a general sense, as it is applied to agents, bailees, and other persons intrusted with the care and management of the property of another, and that it is in none of the cases intended to invest them with either the rights or the obligations of technical trustees.<sup>2</sup> They are under obligations to the stockholders to use their best exertions in all matters which relate to the affairs of the company, and this duty results *from the employment*, — not to make any profit out of the position, beyond their compensation, and not to acquire any adverse interests while they remain directors, except such as enure to all the stockholders.<sup>3</sup> But a director, as well as any other person may buy and sell the stock of the corporation, and may subscribe for stock in the corporation not

officers of a company where capital is contributed in shares are, in a very legitimate sense, trustees alike for its stockholders and its creditors, though they may not be trustees technically and in form. They accordingly have no right to enter into or participate in any combination, the object of which is to divest the company of its property and obtain it for themselves at a sacrifice; they have no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. Contrariwise, in case of embarrassment to the company, and any necessity to sell the estates of the company, it is their duty, to the extent of their power, to secure for all those whose interests are in their charge the highest possible price for the property which can

be obtained for it." *Pearson v. Concord R. R. Co.*, 59 N. H. —.

<sup>1</sup> *Lexington, &c. R. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556.

<sup>2</sup> *SHARSWOOD, J.*, in *Speering's Appeal*, 71 Penn. St. 11.

<sup>3</sup> *Benson v. Heathorn*, 1 Y. & C. 326; *Aberdeen Railw. Co. v. Blakie*, 1 Macq. (Sc.) 461; *Great Luxembourg Railw. Co. v. Magnay*, 25 Beav. 586; *Barnes v. Brown*, 80 N. Y. 527. Directors are the agents of the corporation with limited powers, and their duties are to conduct its affairs in furtherance of the ends of its creation. They have no power to destroy it, to give away its funds, or to deprive it of any of its means to accomplish the full purpose for which it was chartered. *Bedford R. R. Co. v. Bowser*, 48 Penn. St. 29; *Belknap v. Davis*, 19 Me. 455.

already taken. Thus, in an Ohio case,<sup>1</sup> it was held that a court of equity will not, on the application of a stockholder, interfere with the management and control of the corporate business, while acting within the scope of their authority, unless they are guilty of a breach of trust, to the injury of such stockholder. This principle is applicable to the action of the board of directors, in receiving subscriptions for that portion of the authorized capital not taken before the corporation was organized, where it will promote the objects of the corporation. A subscription for such stock, made by one member of the board with the consent of the other members, and payment of the par value thereof, when the transaction is free from fraud, and is beneficial to the corporation, will not be set aside at the instance of a stockholder, when no action has been taken to withhold such stock from subscription or sale.<sup>2</sup> If he makes a purchase of property for

<sup>1</sup> *Sims v. Brooklyn Street Railw. Co.*, 37 Ohio St. 556.

<sup>2</sup> *Dodge v. Woolsey*, 18 How. (U. S.) 342; *Ware v. Grand Junction Co.*, 2 Russ. & M. 470; *Gifford v. N. J. R. Co.*, 10 N. J. Eq. 171; *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545; *Bissell v. Mich. Southern R. R. Co.*, 22 N. Y. 258; *Kean v. Johnson*, 9 N. J. Eq. 401. In *European, &c. R. Co. v. Poor*, 59 Me. 277, APPLETON, C. J., said: "A trustee is one in whom property is vested in trust for others. Every person is to be deemed a trustee to whom business and interests of others are confided, and to whom the management of their affairs is intrusted. The general rule is that a trustee, so far as the trust extends, can never become a purchaser of the property embraced within the trust, save with the consent of all parties interested. The underlying principle is that no man can serve two masters. He who is acting for others cannot be permitted to act adversely to his principals. The agent to sell cannot become a purchaser of that which he is the agent to sell, for his position as selling agent is adverse to and inconsistent with that of a purchaser. So the agent to purchase cannot at the same time occupy the position of a seller. It is not that in particular instances the sale or the purchase may not be reasonable. But to avoid temptation, the agent to sell is disqualified from purchasing, and the agent to purchase from selling.

In all such contracts the sales or the purchases may be set aside by him for whom such agent is acting. The *cestui que trust* may confirm all such sales or purchases if he deems it for his interest. The affirmation or disaffirmance rests with him; and the trustee, when buying trust property from or selling it to himself, must assume the risk of having his contracts set aside, if the *cestui que trust* is dissatisfied with his action."

In this case the court say: "The bill alleges that 'at a meeting of the directors of said company (the E. & N. A. Railway Co.), holden on the 25th day of August, 1865, a contract previously made between said company and a certain firm, under the name of Pierce & Blaisdell, and signed by said defendant, as president of said company, and by Pierce & Blaisdell, for the construction of said railroad, was approved, adopted, and confirmed; that said Pierce & Blaisdell did proceed, under said contract, in the construction of said railroad, and received large sums of money under the same contract;' and 'that there was an agreement between said defendant while he was president and director, as aforesaid, and said firm of Pierce & Blaisdell, or one of the members of said firm, that said defendant should receive a large sum of money for or on account of said contract, or a part of the profits which might be received by said Pierce & Blaisdell, under and by their performance of

the corporation, he cannot treat it as a purchase for himself, and charge the corporation a profit thereon;<sup>1</sup> nor can he purchase claims

said contract for the construction of said railroad.' To this portion of the bill the defendant has demurred, thereby admitting, for the purposes of the present argument, his interest in the contract of Pierce & Blaisdell with the corporation of which he was president and a director, made when he was acting as such, and in the profits of which he was a participant while holding those positions. As the agent to sell cannot purchase what he is to sell, nor the agent to purchase buy of himself, so the agent to contract cannot, as agent, contract with himself as principal. The interest of the parties to a contract, whether of purchase, a sale, or for work or labor, are adverse and inconsistent with each other. It is the duty of the directors of a corporation to act for the best interests of such corporation. If a director be a party to a contract entered into with himself, his duty as an officer is in conflict with his interests as an individual. This is equally so, whether he enters into the contract on its inception, or subsequently acquires an interest in it. If he enters originally into the contract as director, with himself as a party, it is not difficult to perceive who would have an advantage in the bargain. If he subsequently becomes a partner, he places himself in a position in which, when any questions arise as to its performance, his interest as a party to the contract conflicts with his duty as an officer. The general rule is that directors cannot legitimately acquire an interest adverse to the corporation, and that *if they purchase any claim against the company it is in trust for the company.*"

The directors are not sureties for the fidelity of the officers of the corporation which they may be authorized to appoint. If they exercise reasonable diligence in the appointments of agents and officers, this

is all that is required. But if they should knowingly appoint a person of bad character to a place of trust, they would be personally responsible. See *Scott v. Deppeyster*, 1 Edw. Ch. (N. Y.) 513. See also *Burbridge v. Morris*, 34 L. J. (N. S.) 131. The rule of equity is liberal, embracing within its purview all fiduciary relations, as those of principal and agent, attorney and client, solicitors, executors, guardians, etc. The president and directors of a corporation must be held as occupying a fiduciary relation to the stockholders for and on behalf of whom they act. "The relation between the directors of a corporation and its stockholders," observes JOHNSON, J., in *Butts v. Wood*, 38 Barb. (N. Y.) 188, "is that of trustee and *cestui que trust*." "The directors," remarks ROMILLY, M. R., in the *York & Midland Railw. Co. v. Hudson*, 19 Eng. L. & Eq. 365, "are persons selected to manage the business of the company for the benefit of the shareholders. It is an office of trust, which, if they undertake it, it is their duty to perform fully and entirely." Persons who become directors and managers of a corporation place themselves in the situation of trustees; and the relation of trustees and *cestui que trust* is thereby created between them and the stockholders. *Scott v. Deppeyster*, 1 Edw. Ch. (N. Y.) 513; *Verplanck v. Mercantile Ins. Co.*, *id.* 85. All acts done by the directors officially should be for the interests of the *cestui que trust*. Holding a fiduciary relation, they cannot be permitted to acquire interests adverse to such relation.

In the *Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586, the Master of the Rolls says: "I have upon various occasions stated what I considered to be the duties and functions of a director of a joint-stock company. He is, in point of

<sup>1</sup> *Blair, &c. Co. v. Walker*, 50 Iowa, 376. Nor can he purchase property at one price and sell it to the corporation at another. *McElhenny's Appeal*, 61 Penn. St. 188; *Great Luxembourg Ry. Co. v. Maguay*,

25 Beav. 586; *Rice's Appeal*, 79 Penn. St. 168; *Benson v. Heathorn*, 1 Y. & C. 326; *Getty v. Devlin*, 54 N. Y. 503; *Simons v. Vulcan Oil, &c. Co.*, 61 Penn. St. 202.

against the corporation, and under a resolution to borrow money upon a mortgage of the property, by having the claims assigned to

fact, not merely a director, but he also fills the character of a trustee for the shareholders, and he is, in regard to all matters entered into in their behalf, to be treated as an agent; therefore there attaches to a director, for the benefit of the shareholders, all the liabilities and duties which attach to a trustee or agent. Accordingly, if a director enters into a contract for the company he cannot personally derive any benefit from it. I accordingly held, in the case of the Midland Railway Co. v. Hudson, that the defendant, as director and trustee, was bound to give to the company the benefit of a large contract entered into by him for iron, which had been used on the railroad, and to render to them the pecuniary advantage which he had derived from it. If, as in the case of the North Midland Railway Co. v. Hudson, a director of a railway company enter into a contract for the purchase of a large quantity of iron in the shape of rails, but before it is wanted, and before it has been actually delivered (for it took some time in that case to perform the contract with the iron-master), the price of iron should happen to rise, the trustee is not at liberty to put into his pocket the difference between the market price of the iron when delivered and that at which it was purchased. He cannot sell it again to the company as if it were his own property. The whole benefit must go to the shareholders, and not to the director."

In *Benson v. Heathorn*, 1 Y. & Coll. 326, the defendant, being director of a joint-stock company established for the building, purchasing, hiring, and employment of steam vessels, purchased a vessel for £1,340, and afterwards sold it to the company as from a stranger for £1,500, charging the company with commission at £1 per cent, the broker's earnest money, and the expenses of a bill of sale to himself,—there being but one bill of sale. It was held that such a transaction could not stand in equity. In *Flint & P. M. R. Co. v. Dewey*, 14 Mich. 477, it appeared that the defendant, the secretary, and another director had been appointed

a committee by the company for building and equipping the road. The committee entered into a preliminary contract with a certain party, and on the same day that party assigned to the defendant's secretary three-eighths of said agreement and four-tenths of a contract to be thereafter entered into; also, providing that they should be at three-eighths the expense of negotiating the bonds of the company which were to be received by the contractor. In a suit by the complainant to compel the delivery of said bonds, it was held that the transaction under which the defendant claimed was clearly fraudulent, and void as against the complainant; that it was his duty (with the other members of the committee), on letting the contract, to use his best efforts and judgments to secure the best terms he could for the company; but in joining with the contractor in taking this very contract which they were employed to let, it became his interest to let the contract at the highest price. "It is possible," observes CHRISTIANCY, J., "that there may have been no actual fraud, and that the contract would not have been let on better terms; but the principle of law applicable to such a contract renders it immaterial, under the circumstances of the case, whether there has been any fraud in fact, or any injury to the company. Fidelity in the agent is what is aimed at; and, as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal; and if such contracts were to stand until shown to be fraudulent and corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud and corruption."

"The general rule of law," says WAYNE, J., in *Michoud v. Girod*, 4 How. (U. S.) 555, "stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private." To give effect to these views in England, it is



a third party or to a firm of which he is a member, execute a valid mortgage of the corporate property to secure such debts.<sup>1</sup> In such

provided by the Companies' Clause Consolidation Act, 8 and 9 Vict. chap. 16, that no person interested in a contract with the company shall be a director; and if any director, subsequent to his election, shall become concerned in any contract, the office of director shall become vacant, and he shall cease to act as such. That directors will not be permitted to make a profit on purchases for or sales to the company, see *Rice's Appeal*, 79 Penn. St. 168; *Blair v. Town Lot, &c. Co.*, 50 Iowa, 376.

<sup>1</sup> In *Davies v. Rock Creek L. F. & M. Co.*, 55 Cal. 359, the corporation, being in debt to the amount of \$12,985, voted to borrow that sum, and authorized its president and secretary to execute a mortgage therefor upon the corporate property. The president, instead of borrowing the money to pay the debts, purchased them and had them assigned to a firm of which he was a member, and then executed to the firm three notes of the corporation for the sum of \$4,328.33 each, and also a mortgage to secure the same, upon the corporate property. In an action to foreclose the mortgage, to which another subsequent mortgagee was made a party defendant, he set up the defence that the corporation never executed the notes and mortgage in question, and the corporation itself denied in its answer that it ever executed or authorized the execution of the mortgage. The court held upon these facts that the notes and mortgage were invalid, *Ross, J.*, saying: "The resolution did not authorize or contemplate the execution of the notes and mortgage for any such purpose. It authorized and contemplated the borrowing of \$12,985, and to that end authorized and directed the president and secretary to execute for and in the name of the corporation, the necessary notes, together with a mortgage upon the corporate property. To borrow the money and to execute the notes and mortgage of the corporation to secure its payment was the sole power conferred on the president and secretary by the resolution. This they did not do, nor attempt to do, so far as the record shows. Instead, the president 'purchased and as-

sumed said debts in the name of A. Wolf & Co.' of which firm he was at the time a member, and then proceeded, in connection with the secretary, to execute the notes and mortgage in suit. This was clearly unauthorized by the resolution adopted by the board of trustees. *Koehler v. Black River Falls Iron Co.*, 2 Black (U. S.), 719. But apart from this consideration, the transaction in question cannot be upheld. The law, for wise reasons, will not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity. The position of A. Wolf as a member of the firm of A. Wolf & Co., and his position as trustee and president of the corporation defendant, were inconsistent and conflicting. In purchasing the debts of the corporation in his individual capacity, it was to his interest to buy them at as great a discount as possible. The greater the discount the greater his gain. If he succeeded in purchasing the debts at any discount, to that extent he secured to himself an advantage not common to all the stockholders. To permit this to be done would be to permit the violation of one of the plainest principles of equity applicable to trustees. In this particular case it does not appear that Wolf secured the claims at any discount, neither does it appear that he did not; nor does the policy of the law admit of any inquiry into that question. Occupying as he did, the position of trustee, he should not have put himself into a position adverse to his *cestuis que trustent*. One cannot faithfully serve two masters whose interests are adverse. *Andrews v. Pratt*, 44 Cal. 309; *San Diego v. San Diego, &c. R. R. Co.*, 44 id. 106; *Wilbur v. Lynde*, 49 id. 290; *Pickett v. School District*, 25 Wis. 552; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Aberdeen Ry. Co. v. Blakie*, 1 Macq. (Sc.) 461. Respecting the point made to the effect that the transaction was ratified by the corporation, it is sufficient to say that even if it admitted of ratification there was no evidence of such ratification. *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 575."

a case he becomes subject to the rule that as a creditor of the corporation he cannot secure an advantage to himself that is not common to all the creditors.<sup>1</sup> He cannot sell the property of the corporation and take the profits upon the sale himself,<sup>2</sup> nor can he enforce an executory contract with the corporation for the furnishing of supplies to it by himself or others when he has an interest in the contract.<sup>3</sup> In England it is held that a director who receives a gift of shares, as an inducement to become a director will be compelled upon a proper suit in equity to restore them to the corporation, or to account to it for their value, upon the ground that the corporation has no authority to give away its shares.<sup>4</sup> So a vote of the board of directors transferring certain property of the corporation to one of their number without sufficient consideration, and merely to induce him to discharge his duties as director, is void, and confers no title upon him.<sup>5</sup>

Contracts entered into by the directors to the prejudice of the corporation, or merely with a view to enable them to retain control of its affairs, are void and will be set aside.<sup>6</sup> Such also is the rule as to all contracts or acts of the directors which are in violation of their trust or which place them in a position where their interests are in any measure adverse to those of their *cestuis que trustent*. Thus, they are not permitted to buy the corporate property for their own benefit either at private sale or at a public sale upon an execution,<sup>7</sup> or at any judicial sale,<sup>8</sup> except it be upon an execution or decree obtained in a suit brought by themselves against the corporation.<sup>9</sup>

<sup>1</sup> Koehler v. Black River Falls Co., *ante*; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140; Emporium Real Estate, &c. Co. v. Emric, 54 Ill. 545; Bennett's Case, 18 Beav. 339. But where the corporation has already mortgaged its property to secure its debts, there seems to be no good reason why a director may not purchase the mortgage for the benefit of the corporation, using either the funds of the corporation or his own for the purpose, — if it is done in good faith to relieve the corporation from embarrassment, and with its full knowledge and concurrence, — and retain a lien upon the property under the mortgage, against a receiver of the corporation, until he and his sureties are reimbursed, Smith v. Lansing, 22 N. Y. 520.

<sup>2</sup> York, &c. Ry. Co. v. Hudson, 16 Beav. 485.

<sup>3</sup> Flanagan v. Great Western Ry. Co., L. R. 7 Eq. 116; Aberdeen Ry. Co. v. Blakie, 1 Macq. (Sc.) 461.

<sup>4</sup> Cavling's Case, L. R. 20 Eq. 580; Nant-y-Glo, &c. Ry. Co. v. Grave, L. R. 12 Ch. Div. 788; McKay's Case, L. R. 2 Ch. Div. 1; Pearson's Case, L. R. 5 Ch. Div. 336. But in England this matter is now regulated by statute 8 & 9 Vict. Ch. 16.

<sup>5</sup> Butts v. Wood, 37 N. Y. 317; Hilles v. Parish, 14 N. J. Eq. 380.

<sup>6</sup> Northern R. R. Co. v. Concord R. R. Co., 50 N. H. 166; Bliss v. Matteson, 45 N. Y. 22.

<sup>7</sup> Hoyle v. Plattsburgh R. R. Co., 54 N. Y. 314.

<sup>8</sup> Covington, &c. R. R. Co. v. Bowler, 9 Bush (Ky.), 468.

<sup>9</sup> In Twin Lick Oil Co. v. Marbury, 92 U. S. 587, a director loaned money to the

Any action tending to their own advantage at the expense of the corporation, the stockholders, or its creditors, whether accomplished by direct acts or indirectly through collusive litigation, will be set aside in equity upon proper application, as fraudulent and void.<sup>1</sup> And if one of the directors of a railway corporation purchases the railroad at a judicial sale, without permission from the corporation, or the court directing the sale, the purchase will enure to the benefit of the corporation upon his being reimbursed by it for the sums expended by him in the purchase.<sup>2</sup>

corporation at a time when it was in pressing need, and a deed of trust was given to secure it, and a fair public sale of the property subsequently made under the deed; he purchased it and the court sustained it, saying: "The right of a corporation to avoid such a sale of its property by reason of the fiduciary relation of the purchaser must be exercised within a reasonable time after the facts connected therewith are made known or can by due diligence be ascertained. And as the courts have never prescribed any particular period as applicable to every case, like the statute of limitations, the determination as to what constitutes a reasonable time in any particular case must be determined by a consideration of all the elements which affect that question." A similar doctrine was held in *Harts v. Brown*, 77 Ill. 226, in a case involving similar questions. But see *Covington, &c. R. R. Co. v. Bowler*, 9 Bush (Ky.), 468, where it was held that the purchase of the railroad by a director at a judicial sale to which he was not a party plaintiff, was voidable. *Colden v. Walsh*, 14 John. (N. Y.) 407; *Bostwick v. Atkins*, 3 N. Y. 53; *Gallatin v. Cunningham*, 8 Cow. (N. Y.) 361; *Johnson v. Bennett*, 39 Barb. (N. Y.) 237; *Bradt v. Brooks*, 8 Wend. (N. Y.) 426; *Harts v. Brown*, 77 Ill. 226. But even a purchase at such a sale is voidable. *Boerum v. Schenck*, 41 N. Y. 182.

<sup>1</sup> *Drury v. Cross*, 7 Wall. (U. S.) 289; *Hoyle v. Plattsburgh, &c. R. R. Co.*, 54 N. Y. 314; *Wardell v. Union Pacific R. R. Co.*, 103 U. S. 651; *Turquand v. Marshall*, L. R. 4 Ch. 376.

<sup>2</sup> *Covington, &c. R. R. Co. v. Bowler*, 9 Bush (Ky.), 468. In *Bill v. Western Union Tel. Co.*, 16 Fed. Rep. (U. S.) 14,

it was held that the directors of a telegraph company, who are also directors of another telegraph company, which owns two-fifths of the stock of the former company, cannot properly vote to lease the former company to the latter. Such a lease is voidable, and will be set aside at the suit of a stockholder who has exhausted all means to obtain redress within the corporation, or who has made proper efforts to induce action upon the part of other stockholders, and has failed, but not otherwise. So the purchase of the assets of a corporation by one of its directors is voidable, *at the instance of a party in interest*; and the presumption in such cases is that the director knew the financial condition of the company, and therefore that the transaction is not *bond fide*. And this presumption is conclusive. *Jones v. Arkansas, &c. Co.*, 38 Ark. 17. Directors assenting to a contract with the corporation from which they are to derive a secret profit, will be compelled to surrender it to the corporation. *Bent v. Priest*, 10 Mo. App. 543. Where the trustees of a corporation purchased of themselves, for the corporation, a patent right, which they had by vote been authorized to purchase, charging the corporation \$50,000 therefor, when they paid only \$16,000 for it, was held to be fraudulent, and that they could not be permitted to make any profit out of the contract. *Downs v. French*, 4 Hun (N. Y.), 292. In *Simons v. Vulcan Oil Co.*, 61 Penn. St. 202, where lands were purchased by parties, and shortly afterwards they with others formed a corporation, to which the land was conveyed by them at a considerable advance, it was held that the defendants were liable for the difference between the price actually

Directors may properly become creditors of the corporation, and as creditors may use any fair means to secure payment. Thus, in a Pennsylvania case, where a bill was filed by a minority of stockholders to set aside a sale of property of an insolvent corporation, made to certain creditors, some of whom were also directors, it was observed by STRONG, J., as follows: "I come then to consider the facts that the purchasers were the same persons as those who as directors sold, and as stockholders authorized the sale. It is often said, and truly, that the same persons cannot be both buyers and sellers in the same transaction. They were not, strictly, in this. All the purchasers were not directors who made the sale. But I make no account of that. Still, why may not directors of a corporation sell to themselves? Each director has an interest distinct and antagonistic to his interest as a mere man. There is an identity of person, but not of interest. There must be many things which directors can do for their individual benefit, which are binding upon a corporation of which they are directors. If they have advanced money, I cannot doubt they may pay themselves with the corporate funds. If they have become liable as sureties for the corporation, they may provide for their indemnity. And though ordinarily the law frowns upon contracts made by them in their representative character with themselves as private persons, such contracts are not necessarily void. They are carefully watched, and their fairness must be shown. But I repeat the question, why may not directors sell to themselves in any case? It is because of the danger that the interests of stockholders may suffer, if such sales be permitted, for want of antagonism between the parties to the contract. But such sales are supported in equity, where the fiduciary relation of the purchasers has ceased before the purchase, where the purchase was made with the full consent of the stockholders, or where stockholders have, by their acquiescence, debarred themselves from questioning the transactions. I do not, however, deem it necessary to decide that the rule in this case was absolutely indefeasible. The utmost

paid by them for the land and the price paid them therefor by the company, they having failed to disclose the fact that the lands were purchased by them at a less price. *McAllen v. Woodcock*, 60 Mo. 174; *Getty v. Devlin*, 54 N. Y. 403; *Blake v. Buffalo, &c. R. R. Co.* 56 id. 485; *McElhenny's Appeal*, 61 Penn. St. 188. They cannot buy claims against the corporation,

or participate in their purchase with others at less than their face, and recover the full amount of the corporation. *McDonald v. Houghton*, 70 N. C. 393; *Brewster v. Streetman*, 4 Mo. App. 41; *Halladay v. Patterson*, 5 Oreg. 177; *Halladay v. Davis*, 5 id. 40. Nor will they be permitted to favor any particular class of stockholders. *Chase v. Vanderbilt*, 62 N. Y. 307.

the complainants claim is that it was voidable. Certainly nothing more can be claimed. Let it be, then, that it might have been set aside at the instance of the corporation, or even of a stockholder, as against the policy of the law and constructively fraudulent. Still, it was valid in equity as well as in law, unless one or the other chose to avoid it; and in all cases in which an attempt is made to fasten a constructive trust upon a purchaser, the attempt must fail unless made in a reasonable time."<sup>1</sup> The doctrine thus clearly set

<sup>1</sup> Ashurst's Appeal, 60 Penn. St. 291. See also *Chester v. Dickerson*, 54 N. Y. 1; *Getty v. Devlin*, id. 403; *Barton v. Plank Road Co.*, 17 Barb. (N. Y.) 397. Acquiescence is presumed from delay. Lapse of time, indeed, is no bar to the assertion of a direct trust, but not so when the trust is constructive. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587. Where a company is insolvent, and the directors have given the stockholders an opportunity to make advances and relieve the embarrassment, the directors may buy the indebtedness, and acquire title to corporate property at a sale under a deed of trust to secure the indebtedness, free from objection on the part of the stockholders. *Harts v. Brown*, 77 Ill. 226. Courts of equity will regard with great jealousy the contracts made between directors and the corporation; and as a general rule such contracts are voidable at the instance of the company or stockholders. And this rule has been held to apply to cases where the majority of the directors in one corporation contract with another corporation, in which they are also directors. *San Diego v. San Diego, &c. R. R. Co.*, 44 Cal. 106; *Abbot v. American H. R. R. Co.*, 33 Barb. (N. Y.) 578; *St. James' Church v. Church of the Redeemer*, 45 id. 356; *Polar Star Lodge v. Polar Star Lodge*, 16 La. An. 76; *Paine v. Lake Erie, &c. R. R. Co.*, 31 Ind. 283. They have no right to enter into or participate in any combination the object of which is to divest the company of its property and obtain it for themselves, to the prejudice of the members or creditors. *Jackson v. Ludeling*, 21 Wall. (U. S.) 616; *Nelson v. Luling*, 62 N. Y. 645. Nor are they entitled to any share of capital stock, nor to any dividends of the profits, until its creditors are paid. The property of the

corporation, in equity, is regarded as held in trust for the payment of its debts; and a sale of its capital stock, and a division of the proceeds among the directors, will not defeat the rights of creditors; but they may proceed in equity to compel the directors to contribute *pro rata* out of the moneys so received and in their hands. Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it, into whosoever possession it may be transferred, unless it has passed into the hands of a *bonâ fide* purchaser; and the rule is well settled that the stockholders are not entitled to any share of the capital stock nor to any dividend of the profits, until all the debts of the corporation are paid. *Story's Eq. Jur.*, § 1252; *Mumma v. Potomac Company*, 8 Pet. (U. S.) 286; *Wood v. Dummer*, 3 Mas. (U. S. C. C.) 308; *Voce v. Grant*, 15 Mass. 522; *Spear v. Grant*, 16 id. 14; *Curran v. Arkansas*, 15 How. (U. S.) 307. *The Chicago, etc., R. R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Hale v. Bridge Co.*, 8 Kan. 466; *Jones v. Terre Haute R. R. Co.*, 29 Barb. (N. Y.) 359; *Barton v. Port Jackson R. R. Co.*, 17 id. 397. But the relation they occupy to the company and its creditors will not prevent directors or other officers and agents from protecting themselves as creditors of the company by the same means that are open to others. Thus, where the president and two directors of a company constituted a quorum, and they, being the only stockholders at the time, sold corporate property to the president in consideration of past indebtedness, and an agreement by him to pay other specified debts of the corporation, and a judgment debtor levied upon the

forth has been also held in other States, where contracts are made with directors or officers of a railroad company for the purpose of securing their influence or interest in attaining the location of depots or machine shops, or the construction of the road so as to promote private interests; and especially would this be the case where the interest of the director under the contract thus made would depend upon the location as desired. The corporation, as well as the stockholders and creditors, would be not only entitled to the unbiassed judgment of the director, which could not be expected under the above state of facts, but also to the benefit of his influence and argument in deciding such questions as a member of the board,—which, of course, would be unreasonable to expect under the facts supposed. And such a course would tend to sacrifice both the public rights and the interests of stockholders.<sup>1</sup>

property thus sold, — it was held that he might be enjoined from proceeding under his levy. *DILLON, J.*, in an Iowa case, says: "Being an officer of the corporation did not deprive Buel [the plaintiff] of the right to enter into competition with other creditors, and run the race of vigilance with them, availing himself in the contest of his superior knowledge, and of the advantage of his position, to obtain security for or payment of his debt. The act of Buel was not legally or constructively fraudulent, in consequence of his being an officer or member of the company." *Buel v. Buckingham*, 16 Iowa, 284. See also *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Sargent v. Webster*, 13 Met. (Mass.) 497; *Whitwell v. Warner*, 20 Vt. 425; *Hayward v. Pilgrim Soc.* 21 Pick. (Mass.) 270; *Smith v. Lansing*, 22 N. Y. 526; *Stratton v. Allen*, 16 N. J. Eq. 229; *City of St. Louis v. Alexander*, 23 Mo. 483; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq. 137, 633. If a director is also a bondholder, he cannot take advantage of his position as a creditor to foreclose the mortgage and sell the road and franchises in satisfaction of his own demand, and under such sale buy in the road for himself in consideration of his own claim, to the exclusion of other bondholders. *Drury v. Cross*, 7 Wall. (U. S.) 299; *Cumberland &c., R. R. Co. v. Parish*, 42 Md. 598;

*Jackson v. Ludeling*, 21 Wall. (U. S.) 616; *Cook v. Berlin Woollen Mills Co.*, 43 Wis. 433. Where a contract in which two of the directors were interested was made with the company, it was held "that nothing short of a ratification by the board, after a full explanation and knowledge of their interest and all the circumstances, could render such a contract binding upon the company." Per *CHRISTIANCY, J.*, in *Flint, &c., R. Co. v. Dewey*, 14 Mich. 477. This doctrine was carried to its extreme limits in *Fuller v. Dame*, 18 Pick. (Mass.) 472, in which case there was a contract, not with a director or officer of the corporation, but with a member merely, for a payment of a pecuniary consideration to such corporation on the location of a depot in a specified place. It was held that such a contract was against public policy on the ground that the interests of the corporation and the public were identical; that each member was required to use his best and unbiassed judgment upon the question of the fitness of the location without the influence which such arrangement might have; and that the question involved was one of good faith, to be left to the jury. *Stark Bank v. United States Pottery Co.*, 34 Vt. 144.

<sup>1</sup> *Pacific R. Co. v. Seely*, 45 Mo. 212; *Linder v. Carpenter*, 62 Ill. 399; *Ogden v. Murray*, 39 N. Y. 202; *Re Union Pacific R. Co.*, 1 Cent. L. J. 582.

There is no reason why, if the corporation stands in need of money, a director may not loan his money to it, as well as a stranger might; nor, having done so in good faith, why he should not be entitled to the same remedies and advantages in enforcing its payment that any other creditor would have.<sup>1</sup> But, while they may pursue the race of diligence in securing their claims against the corporation, with other creditors, and make use even of the knowledge which their position as directors has enabled them to acquire, in securing their claim, yet they must act fairly, and cannot by any vote or action as a board secure to themselves a preference over other creditors; and if they do, a court of equity, in an action by a creditor, will compel them to yield up the advantage which was acquired by a violation of their trust. If the loan is made in good faith, it is held that they are entitled to be reimbursed therefor, although it in fact had no authority to borrow.<sup>2</sup> So, too, they may deal in the stock of the corporation on their own account, and may buy the same of, or sell it to the stockholders, as any stranger might do, and in respect thereto assume no other obligations or liabilities than a stranger would.<sup>3</sup>

It is their duty to act for the best interests of the company, and if they enter into a contract with the company, their duty as officers is in conflict with their duty as individuals. And the same doctrine has been held to apply, whether they are a party to the contract in its inception, or whether they subsequently acquire an interest in it; as the rule is, that directors cannot acquire an interest, directly or indirectly, adverse to the corporation; and if, taking advantage of their knowledge and position, they make an advantageous bargain in the purchase of a claim against the corporation, the profits thus made will be treated as held in trust for the company.<sup>4</sup> This is in conformity with the rule that no man can faith-

<sup>1</sup> *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Bradley v. Williams*, 3 Hughes (U. S. C. C.), 26; *Danst v. Gale*, 83 Ill. 136; *Harts v. Brown*, 77 id. 226; *Merrick v. Penn. Coal Co.*, 61 id. 472; *Hotel Co. v. Wade*, 97 U. S. 13. In *Twin Lick Oil Co. v. Marbury*, 91 id. 587, it was held that a loan of money to a corporation by one of its directors, *openly and in good faith*, and his subsequent purchase of the property at a fair public sale under a deed of trust, executed to secure the payment of the money so loaned, were valid trans-

actions. And the soundness of this doctrine, where perfect good faith is shown to exist, can hardly be questioned.

<sup>2</sup> *Chippendale's Case*, 4 De G. M. & G. 19.

<sup>3</sup> *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108.

<sup>4</sup> *European, &c. R. R. Co. v. Poor*, 59 Me. 277. It is held to be illegal for directors of a railway company to become members of a company with whom they have made a contract to build and equip the road, so as to share the profits; and if they

fully serve two masters whose interests are or may be in conflict. The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. It may be regarded as a prevailing principle of the law, that an agent must not put himself, during his agency, in a position which is adverse to that of his principal. For even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied upon, yet the principal has in fact bargained for the exercise of all the skill, ability, and industry of the agent, and he is entitled to demand the exertion of all this in his own favor.<sup>1</sup>

do, a court of equity will compel them to account to the corporation for the profits realized therefrom. *Gilman, &c. R. R. Co. v. Kelly*, 77 Ill. 426; *Thomas v. Brownsville, &c. R. R. Co.*, 1 McCrary (U. S. C. C.), 392; *Keeler v. Brooklyn Elevated R. R. Co.*, 9 Abb. N. C. (N. Y.) 166; *Blakie v. Aberdeen Railway Co.*, 14 Scotch, S. C. (2d Series) 66. But unless the fraud is properly pleaded it cannot be inquired into, and if the company has treated the directors as contractors while the work was being done, it is afterwards (as a corporation) precluded from treating them as trustees. *Risley v. Indianapolis, &c. R. R. Co.*, 62 N. Y. 240.

<sup>1</sup> In *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553, the president and secretary, in pursuance of a vote of the directors of the corporation, sold and conveyed to the defendant, who was one of the directors, a large tract of land. The action was commenced to have the deed declared void and cancelled. After a very elaborate and searching review of the authorities, the court came to the conclusion that the deed could not be sustained. Among other things, it said: "There can be no question, I think, at the present time, that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature toward his principal, and is subject to the obligations and disabilities incidental to that relation. Neither are the duties or obligations of a director or trustee altered from the circumstance that he is one of a number of directors or trustees, and that this circumstance dimin-

ishes his responsibility, or relieves him from any incapacity to deal with the property of his *cestui que trust*. The same principles apply to him as one of a number as if he was acting as a sole trustee. It is not doubted that it has been shown that the relation of the director to the stockholders is the same as that of the agent to his principal, the trustee to his *cestui que trust*; and out of the identity of these relations necessarily spring the same duties, the same danger, and the same policy of the law." In *Aberdeen Railway Co. v. Blakie*, 1 Macq. 461, the House of Lords held that a contract entered into by a manufacturer for the supply of iron furnishings to a railway company, of which he was a director, or the chairman, at the date of the contract, could not be enforced against the company. Lord CRANWORTH, delivering the opinion of the court, says: "A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character toward his principal, and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how



They are not absolutely precluded from making contracts with the corporation or from being interested in contracts entered into by third persons with the corporation, *but they are precluded from doing so except where the corporation and all the stockholders are advised fully of the nature and extent of their interest therein and have expressly or impliedly assented thereto.*<sup>1</sup> The rule may be said to be

far, in any particular case, the terms of such a contract have been the best for the *cestui que trust* which it was possible to attain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better. But still, so inflexible is the rule that no inquiry on that subject is permitted. In *Pickett v. School District, No. 1, &c.*, 25 Wis. 552, the plaintiff, who was the trustee of a school district, entered into a contract with the other two trustees, to build for the district a school-house. The stipulated price not being paid, he brought his action on the contract. The court said: "We think there is one fatal objection to the plaintiff's right to maintain this action, which renders it unnecessary to consider any of the other questions discussed. That is, that inasmuch as it appears that the plaintiff was himself the director of the district at the time the contract was let, and took part as such in the proceedings to let it, it was against public policy to allow him, while holding that fiduciary relation to the district, to place himself in an antagonistic position, and obtain the contract for himself from the board of which he was a member." In *Dobson v. Racey*, 3 Sandf. Ch. (N. Y.) 62, Dobson, being the owner of certain real estate, mortgaged it to Racey, and then executed a power of attorney to him, authorizing him to sell and convey the premises in such manner as he might deem proper, and out of the proceeds of the sale, after paying the mortgage debt, to pay over the surplus to the wife of Dobson. Dobson went abroad and died. Shortly after Dobson left, Racey, by virtue of the power of attorney, conveyed the premises to one Harrison, who, without paying or agree-

ing to pay anything therefor, two days thereafter reconveyed to Racey. Racey satisfied the mortgage, and paid \$100 to the widow of Dobson. The action was commenced by the heirs of Dobson, claiming that the sale to Harrison was inoperative and void. The court, after declaring that it is now a settled rule, both in England and in this country, that no party can be permitted to purchase an interest when he has a duty to perform which is inconsistent with his character of purchaser, say: "The law declares the sale unwarrantable, on grounds of public policy, irrespective of any proof of injury or intentional wrong." See also *Boyd v. Blankman*, 29 Cal. 19.

<sup>1</sup> *Aberdeen Railway Co. v. Blaikie*, 1 Macq. (Sc.) 461; *York & North Midland Railway Co. v. Hudson*, 16 Beav. 485; *Bank of London v. Tyrell*, 10 H. L. Cas. 26; *Buel v. Buckingham*, 16 Iowa, 284. A director of a corporation may become its creditor, and may foreclose a mortgage upon its property given to him to secure his debt, and may purchase the same upon execution sale; but he is bound to act in the utmost good faith, and the sale will be set aside upon slighter grounds than in the case of ordinary creditors. *Hallam v. Indiana, &c. Hotel Co.*, 56 Iowa, 178. The general doctrine in reference to the unauthorized acts of agents is, that the ratification is equivalent to original authority to act in the matter which has been ratified. If a corporation ratifies the unauthorized acts of its agent, the ratification is equivalent to a previous authority, as in the case of natural persons. No maxim is better settled in reason and law than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur*; at all events, when it does not prejudice the rights of strangers. *Fleckner v. United States Bank*, 8 Wheat. (U. S.) 363; *Essex Turnpike Co. v. Collins*, 8

that, in order to retain any advantage which they have obtained at the expense of the company, there must have been upon their part such communication to their co-directors or the stockholders as will enable them to make an exact estimate of the profits which have accrued, or may accrue to them therefrom;<sup>1</sup> and it seems that there should even then be a ratification by the board of directors or the stockholders.<sup>2</sup>

As a rule, all such contracts are at least voidable at the instance of the corporation or a stockholder, when there has been no assent thereto, however fair, just, or even beneficial to the corporation, they may be. *Prima facie*, such contracts are fraudulent,<sup>3</sup> and that

Mass. 299; *Haden v. Middlesex Turnpike Co.*, 10 id. 403; *Salem Bank v. Gloucester Bank*, 17 id. 28; *White v. Westport Cotton Mfg. Co.*, 1 Pick. (Mass.) 220; *Bulkley v. Derby Fishing Co.*, 2 Conn. 252; *White v. Derby Fishing Co.*, id. 260; *Hoyt v. Thompson*, 19 N. Y. 207; *Peterson v. Mayor of New York*, 17 id. 449; *Baker v. Cotter*, 45 Me. 236; *Church v. Sterling*, 16 Conn. 388; *Bank of Pennsylvania v. Reed*, 1 W. & S. (Penn.) 101; *Hayward v. Pilgrim Society*, 21 Pick. (Mass.) 270; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205; *Planters' Bank v. Sharp*, 12 Miss. 75; *Burrill v. Nahant Bank*, 2 Mass. 167; *Fox v. Northern Liberties*, 3 W. & S. (Penn.) 103; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. (Penn.) 267; *New Hope Bridge Co. v. Phoenix Bank*, 3 N. Y. 156; *Everett v. United States*, 6 Port. (Ala.) 166; *Medomak Bank v. Curtis*, 24 Me. 38; *Whitwell v. Warner*, 20 Vt. 425; *City of Detroit v. Jackson*, 1 Dong. (Mich.) 106; *Merchants' Bank v. Central Bank*, 1 Ga. 428; *Hoyt v. Bridgewater, &c. Co.*, 6 N. J. Eq. 253; *Stuart v. London R. Co.*, 15 Beav. 513; 10 Eng. L. & Eq. 57; *MacLae v. Sutherland*, 3 E. & B. 1; 25 Eng. L. & Eq. 92; *Reuter v. Electric Tel. Co.*, 6 E. & B. 341; 37 Eng. L. & Eq. 189; *Emmet v. Reed*, 8 N. Y. 312. See also, *Baker v. Cotter*, 45 Me. 236; *Walworth Co. Bank v. Farmers' L. & T. Co.*, 16 Wis. 629. And this doctrine is equally applicable to directors as to other agents of a corporation, if the act is one which the corporation has power to exercise. The ratification operates as though

the authority to do the act had previously existed. But the intervening rights of third parties cannot be affected by the subsequent ratification. *Cook v. Tullis*, 18 Wall. (U. S.) 332; *Wood v. McCann*, 7 Ala. 806; *Taylor v. Robinson*, 14 Cal. 396; *McCracken v. San Francisco*, 16 id. 591.

<sup>1</sup> *Greene's Brice's Ultra Vires*, 481; *European, &c. R. R. Co. v. Poor*, 59 Me. 279; *Flint, &c. R. R. Co. v. Dewey*, 14 Mich. 477.

<sup>2</sup> *CHRISTIANCY, J.*, in *Flint, &c. R. R. Co. v. Dewey*, *ante*; *Hotel Co. v. Wade*, 97 U. S. 13.

<sup>3</sup> *Alford v. Miller*, 32 Conn. 543. "The general doctrine with reference to this class of contracts is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it." *Addison v. Lewis*, 75 Va. 701. In *Ryan v. Leavenworth, &c. R. R. Co.*, 21 Kan. 365, an association of fifteen persons, consisting among others of two of the directors of a railway corporation, one of whom was its president, and the other its treasurer, was formed to obtain a contract for the construction of the railroad of said corporation; to gain the control of the corporation by the issuance to the association, as part payment of the work to be done, of a majority of the stock of the corporation; to depreciate and render valueless the shares of certain stockholders, and acquire for the association the property and effects of the corporation. At a meeting of a bare quorum of the directors of the corporation, at

too, even though the corporation as such or a *majority* of the stockholders have assented thereto. This rule also applies to contracts

which the president and treasurer attended, a proposal was received from C., who was a member of the association, on behalf of himself and his associates, whose names were concealed, to construct the road. The directors referred the matter to the president of the corporation. He made the contract therefor with C., as previously arranged with the association, but in fact for the joint interest of all the members of the association, which included the president and treasurer. To further conceal the true character of this arrangement, C. transferred the contract to G. & Co., and under the latter name the work was done. This transfer was merely colorable; the work was performed, expenses paid, and profits divided by the association. The name of G. & Co. was only another style for the association. The president, who executed the contract, has been continued in office as a director and president. It was held that the contract, made by the president in the name of the corporation with C., for the benefit of himself and his associates, is fraudulent and void, and that all the persons who participated with the directors and officers of the corporation in their fraudulent and unlawful transactions, with full knowledge of all the facts, are equally liable with said officers. The *fairness* of the contract will not be considered by the court. *Gilman, &c. R. R. Co. v. Kelly*, 77 Ill. 426; *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. L. 505, where it is sought to have it set aside by one of the *cestui que trusts*, who has never assented thereto. In *Flint, &c. R. R. Co. v. Dewey*, 14 Mich. 477, a person who was a member of a committee to let out a contract for the corporation, after having entered into a preliminary contract with a party in reference to the matter, upon the same day took an assignment from the contractors of three-eighths of the contract, and of four-tenths of a contract to be thereafter entered into, and stipulating as to a portion of the expense of negotiating the bonds of the company which the contractor was to receive. In an action to compel the delivery of the bonds by the company, *CHRISTIANCY, J.*,

said: "It is possible that there may have been no *actual* fraud, and that the contract could not have been let on more favorable terms, but the principle of law applicable to such contracts renders it immaterial *under the circumstances of this case*, whether there has been any fraud in fact or injury to the company. If such contracts were held valid until shown to be fraudulent and corrupt, the result, as a general rule would be that they must be enforced in spite of fraud and corruption." *MANNING, J.*, in *People v. Overysse*, 11 Mich. 225; *Michaud v. Girard*, 4 How. (U. S.) 555. In a case before the United States Supreme Court, a coal contract entered into July 16, 1868, by the Union Pacific R. R. Co., by direction of the executive committee of the board of directors with Godfrey and Wardell, which the latter assigned, without consideration, to a new company, in which a majority of the stock was taken by six directors of the old company, was declared to be fraudulent and void. *Wardell v. Union Pacific R. R. Co.*, 103 U. S. 651. And in another case a contract between a railroad and a construction company was held to be void when any of the directors of the railroad are members of the construction company; and that the fact of long acquiescence on the part of the stockholders of the railroad makes no difference; and a court of equity will refuse equitable relief under such a contract, it appearing upon its face that the railroad directors received a pecuniary consideration for making it. *Thomas v. Brownsville, Fort Kearney, &c. Railway Co.*, 1 McCrary (U. S. C. C.), 392. But where the corporation and all its stockholders assent to the contract it will be sustained. Thus A., who was president of a railroad company, contracted with B. to build and equip a portion of the road, for a certain number of its shares of stock and of its bonds. B. immediately assigned the contract to A., who fulfilled it at a cost to himself of less than the par value of the stock and bonds received, but of more than their actual value. The contract and assignment were made in good faith, with the assent of all the stockholders and

where the majority of the directors of one corporation contract with another corporation, in which they are also directors; as the same policy which forbids such contracts in the one case, forbids them in the other.<sup>1</sup> In some of the cases it is said that this class of contracts is void, but unless there is absolute fraud, in fact they are treated as voidable merely, as between the stockholders, the corporation, and the directors; and the *cestuis que trustent* who have expressly or impliedly ratified the same, or even tacitly assented thereto, are bound thereby; but those who have dissented, may have relief in equity therefrom.<sup>2</sup> But courts of equity are now inclined to hold that where the *cestui que trust*, knowing the facts, delays for an unreasonable time to take measures to have the action of the directors set aside, he will be treated as acquiescing therein, and be estopped from setting up its invalidity.<sup>3</sup> But where delay results from ignorance of the facts, acquiescence cannot be presumed.<sup>4</sup>

As previously stated, a director is precluded from acquiring an interest in a contract *after* it has been entered into by a third person with the corporation, as well as at its inception;<sup>5</sup> because the same mischiefs result in the one case as in the other, and the same adverse and antagonistic interests are created. Both the corporation and the stockholders have a right to demand from the directors

directors, and as the only means of ensuring the construction of the road. In an action against A. by a receiver of the road, to recover an assessment upon the difference between the par value of the stock received by A. and the cost to him of performing the contract, it was held that the action could not be maintained. *Van Cott v. Van Brunt*, 82 N. Y. 535.

<sup>1</sup> *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. (U. S.) 48; *San Diego v. San Diego, &c. R. R. Co.*, 44 Cal. 106; *Wardell v. Union Pacific R. R. Co.*, 4 Dill. (U. S. C. C.) 380; *Alford v. Miller*, 32 Conn. 543; *First National Bank v. Reed*, 36 Mich. 263; *Polar Star Lodge v. Polar Star Lodge*, 16 La. An. 76; *Stevenson v. Bay City*, 26 Mich. 44; *Paine v. Lake Erie, &c. R. R. Co.*, 31 Ind. 283; *Levissee v. Shreveport, &c. R. R. Co.*, 27 La. An. 641; *Rice's Appeal*, 79 Penn. St. 681. But the mere fact that some of the persons assisting to make a contract between two corporations are officers in both, does not render such contract void, but merely

voidable. *Mayor, &c., of Griffin v. Inman*, 57 Ga. 370.

<sup>2</sup> *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. Eq. 305; *Risley v. Indianapolis, &c. R. R. Co.*, 62 N. Y. 240; *Butts v. Wood*, 37 id. 317; *Gardner v. Ogden*, 22 id. 327; *Aberdeen Railway Co. v. Blakie*, 1 Macq. (Sc.) 461; *York, &c. Co. v. Mackenzie*, 8 Bro. P. C. 42; *Midland Railway Co. v. Hudson*, 16 Beav. 485; *Ashurst's Appeal*, 60 Penn. St. 290; *Watt's Appeal*, 78 id. 370; *Cumberland Coal Co. v. Parish*, 42 Md. 598.

<sup>3</sup> *Ashurst's Appeal*, *ante*; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Thomas v. Brownsville, &c. R. R. Co.*, 2 Fed. Rep. 877; *Hayward v. National Bank*, 96 U. S. 611; *Hotel Co. v. Wade*, 97 U. S. 13.

<sup>4</sup> *Hoffman, &c. Coal Co. v. Cumberland, &c. Co.*, 16 Md. 456; *Clinton, &c. R. R. Co. v. Kelly*, 77 Ill. 426.

<sup>5</sup> *Ryan v. Leavenworth, &c. R. R. Co.*, 21 Kan. 365; *Gilman, &c. R. R. Co. v. Kelly*, 77 Ill. 426.

perfect fairness in the discharge of their duties, and the exercise of at least common-sense and ordinary prudence. They are, therefore, not permitted to favor one class of stockholders to the exclusion or injury of another. They can make no disposition of the property which does not enure to the equal benefit of all the stockholders. If they attempt to divide the property they must do it in such a manner that each stockholder shall receive his proportionate share; and they cannot agree for, or bind the stockholders by any other division.<sup>1</sup>

The corporation is the proper and primary party to call the directors to an account in a court of equity for fraud or breaches of trust in the management of its affairs. To enable a shareholder, either for himself alone or for himself and others, to maintain a bill against directors for such fraud or breaches of trust, he must allege and show, not only the violations of duty or breaches of trust on the part of the directors, but that he as stockholder has been damnified thereby, and that the corporation has failed or refused to take the proper legal steps for the redress of the wrong. But if on a bill filed by the stockholders the proof should sustain its allegations that a majority of the shares of the corporation are owned by another alleged rival company, and that a majority of the directors of the alleged fraudulently managed corporation are adverse to the interest of the complainants and are combined against them, and would by means of the control that they exercise frustrate and defeat any attempt to induce the corporation to take action for the redress of the wrongs alleged, — such facts would be a sufficient excuse for not making or alleging a formal demand upon the corporation to take action, especially where the rival company and the alleged fraudulently managed corporation are both made defendants.<sup>2</sup>

<sup>1</sup> *Hale v. The Bridge Co.*, 8 Kan. 466; *Chase v. Vanderbilt*, 62 N. Y. 307; *Percy v. Millandon*, 3 La. 568; *Barton v. Port Jackson, &c. Plank Road Co.*, 17 Barb. (N. Y.) 397; *Jones v. Terre Haute R. R. Co.*, 29 id. 359. "Every authority possessed by them," says the Master of the Rolls, in *Harris v. North Devon Railway Co.*, 20 Beav. 584 (as to forfeit shares), "is a power and discretion in the directors, who are trustees for the benefit of all the shareholders, which is to be exercised for the benefit of all; and it is the duty of the directors to direct a forfeiture where it is for the benefit of all the share-

holders, and to abstain from doing so, when it is not for their benefit."

<sup>2</sup> *ALVEY, J.*, in *Booth v. Robinson*, 55 Md. 419. *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Memphis v. Dean*, 8 Wall. (U. S.) 73; *Robinson v. Smith*, 3 Paige Ch. (N. Y.) 222; *Greaves v. Gouge*, 69 N. Y. 154; *Peabody v. Flint*, 6 Allen (Mass.), 52; *Brewer v. Boston Theatre*, 104 Mass. 378; *Foss v. Harbottle*, 2 Hare, 461; *Menier v. Hooper Tel. Works*, L. R. 9 Ch. 350; *Mason v. Harris*, 11 Ch. Div. 97; *Heath v. Erie R. R. Co.*, 8 Blatchf. (U. S. C. C.) 347.

**SEC. 151. Relation of Directors to the Corporation and the Public: Liability for Wrongful Acts, etc.**—As to the corporation itself, the directors are treated as its agents, both general and special. They are *special* agents in the sense that their powers are circumscribed and limited by the laws under which the corporation is created; and *general*, because they have the general management and control of the business and property of the corporation, and can bind it as to all matters within the powers conferred by the statute, and are not subject to the control of the stockholders as to any matters coming within the purview of any of these powers. Indeed, in all cases, except where the charter or general laws otherwise provide, the entire administration of the affairs of a corporation is committed to its directors.<sup>1</sup>

<sup>1</sup> *Dana v. Bank of the United States*, 5 W. & S. (Penn.) 246; *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 113; *Union Gold Mining Co. v. Rocky National Bank*, 2 Col. 556. The distinction raised in the text, as to the special and general agency of directors, is of importance only in those cases where third persons dealing with the corporation are bound to know what the provisions of the charter are, and the powers thereby vested in the corporation or its directors; and in the case of railroad corporations formed under general laws, the statute being public, all persons are bound to take notice of its provisions; and in the case of *special* charters granted to railroad companies it is now, and has been for several years, the practice to declare that they shall be treated as public acts; and it may be questionable, whether, by reason of the public character of the enterprise and the powers conferred, it would not be held that they are *ex necessitate* public acts. Strictly, there is no great importance to be attached to the distinction between the special and general powers of directors of railroad corporations, as in the end the whole question resolves itself into one of authority. "There are," says COMSTOCK, J., in *Mechanics' Bank v. New York, &c. R. R. Co.*, 13 N. Y. 599, "in the books many loose expressions concerning the distinction between general and special agency. The distinction itself, is highly unsatisfactory, and will be found quite insufficient to solve a great variety of cases. It is not profitable to dwell upon that distinction.

Underlying the whole subject, there is this fundamental proposition, that a principal is bound only by the authorized act of his agent. This authority may be proved by the instrument which creates it; and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having an authority which will embrace the particular act in question. I know of no other mode in which a controverted power can be established." But in the case of corporations, the corporation itself ordinarily can confer no power or authority upon its officers which the charter or general law does not confer, and if it attempts to do so, the only effect of its acts is to exonerate the directors from liability to it for the consequences of the exercise of the power, and does not necessarily give validity to the act. The question whether it does so or not, depends upon the circumstance whether the act is *ultra vires* or not, or whether the authority so conferred is one which was reserved to the stockholders under the charter, and which they can delegate to the directors. Therefore, it is held in a large number of cases, with much show of reason, that directors of a corporation are its *special*, rather than its *general* agents; and that the public are bound to know the extent of their powers. *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. (Penn.) 180; *Adriance v. Roome*, 52 Barb. (N. Y.) 309; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262; *Risley v. Indianapolis, &c. R. R. Co.*, 62

In the case of railroad companies, being *quasi* public corporations, their directors are treated as trustees for the public, as to the franchises of the corporation and the manner of their exercise, in consideration of the prerogative powers conferred upon them;<sup>1</sup> and as to the stockholders and creditors, as we have already seen, they are treated as *quasi* trustees both as to the property of the corporation and the management of its affairs.

Occupying this relation, it will be seen that their powers and duties are complex, onerous, and full of responsibility. During their term of office they act as and for the corporation, and in the management of its affairs are dependent solely upon their own knowledge of the business, and their own judgment as to what its interests require. In most matters the sole power of control is vested in them by the charter, and any action of the stockholders would at best be only advisory, and often no protection whatever against the consequences of their acts to third persons, or those stockholders not participating in the action of the meeting. The corporation, as to all matters in reference to which they are authorized to act, speaks and acts through them. To all intents and purposes, for the time being they are the corporation. In the management of the affairs of a railroad corporation especially, it would be extremely strange if their action should in all cases be in accordance with the notions or ideas of *all* the stockholders; and it is for this reason that, while the law holds them up to a proper responsibility to the corporation, the stockholders and the public, yet it only requires of them a fair and *bond fide* exercise of their best judgment, and of such skill and diligence as the nature of the business and of their relation requires, and such as a prudent man would exercise if the business was his own;<sup>2</sup> and for the consequences of such acts, however disastrous to

N. Y. 240. But in reality, except in rare instances, the distinction referred to in the text is of no practical importance, and it is quite sufficient that directors are agents of the company, and the exact nature of the agency is generally unimportant.

<sup>1</sup> St. Joseph, &c. R. R. Co. v. Ryan, 11 Kan. 608; 15 Am. Rep. 357; Pueblo, &c. R. R. Co. v. Taylor, 6 Cal. 1; 45 Am. Rep. 512; Bedford R. R. Co. v. Bowser, 48 Penn. St. 29.

<sup>2</sup> Scott v. DePeyster, 1 Edw. Ch. (N. Y.) 513; Hodges v. New England

Screw Co., 3 R. I. 9; Speering's Appeal, 71 Penn. St. 11; Smith v. Prattville Mfg. Co., 29 Ala. 503. In Speering's Appeal, 71 Penn. St. 11, Judge SHARSWOOD says: "It is by no means a well-settled point what is the precise relation which directors sustain to the stockholders. They are undoubtedly said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be

the company, they are not responsible in damages. The fact that their acts are in opposition to the wishes or views of *all* the stockholders, if within the scope of the powers conferred upon them, *bond fide*, and in accordance with their best judgment, affords no ground for an interference with their action by the courts. The court cannot usurp the powers which the statute has conferred upon the directors, or substitute *its* judgment for theirs, as to acts in reference to which the statute has authorized them to act for the corporation.<sup>1</sup> But if their acts are fraudulent, or of such a grossly improvident

regarded as mandataries, persons who have gratuitously undertaken to perform certain duties, and who are, therefore, bound to apply ordinary skill and diligence, but no more. Indeed, as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill. Ought they to be held responsible for mistakes of judgment or want of skill and knowledge? . . . We are dealing with their responsibility to stockholders, not to outside parties, creditors and depositors. Upon a close examination of all the reported cases, although there are many dicta not easily reconcilable, yet I have found no judgment or decree which held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that their responsibility is limited to these cases; there may exist such a case of negligence or of acts clearly *ultra vires* as would make perfectly honest directors personally liable. . . . While directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement, or wilful misconduct, or breach of trust, for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence, by which such fraud has been perpetrated by agents, officers or

directors, — yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to be absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body. . . . Conceding that the directors did violate the charter, it was a question upon which with all due care they might have made an honest mistake, and, moreover, it appears that they acted throughout by advice of their counsel. It is well settled that trustees will be protected from responsibility under such circumstances." The same doctrine is maintained in *Scott v. De Peyster*, 1 Edw. Ch. (N. Y.) 513. See also *Godbold v. Mobile Bank*, 21 Ala. 191; *Bank of St. M. v. St. John*, 25 id. 566; *Smith v. Prattville Mfg. Co.*, 29 id. 503; *Pontchartrain R. Co. v. Paulding*, 11 La. An. 41; *Christ Church v. Barksdale*, 1 Strobb. Eq. (S. C.) 197; *Williams v. Gregg*, 2 id. 316; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178; *Lexington R. Co. v. Bridges*, 7 id. 559; *Bayless v. Orne*, 1 Freem. Ch. (Miss.) 174; *Hodges v. New England Screw Co.*, 1 R. I. 312; *Knowlton v. Congress Spring Co.*, 57 N. Y. 518; *Re European C. R. Co.*, *Syke's Case*, L. R. 13 Eq. 255. A cause of action against the officers of a corporation individually is assignable. *Bonnell v. Wheeler*, 16 Abb. Pr. (N. Y.) 81. Where officers may maintain actions for contribution from other officers, see *Nickerson v. Wheeler*, 118 Mass. 295.

<sup>1</sup> *Baltimore v. Baltimore, &c. R. R. Co.* 2 Md. 50; *Cass v. Pittsburgh, &c. R. R. Co.*, 80 Penn. St. 31; *La Grange v. State Treasurer*, 24 Mich. 468; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *Turquand v. Marshall*, L. R. 4 Ch. 376.



character as to raise a presumption of fraud or bad faith on their part, a court of equity not only may, but in a proper action will interfere to protect the interests of the corporation, the stockholders, and the creditors. So too, for injuries resulting from their fraud, wilful malfeasance and gross negligence or imprudence, they are liable to the corporation, or to the stockholders, if the corporation upon demand neglects or refuses to enforce such liability.<sup>1</sup>

Thus, where the directors of an insurance corporation fraudulently permitted false statements to be officially made as to the condition of the company, it was held that they were personally liable to a party who had suffered damage thereby.<sup>2</sup> But it has been held that a director is not liable for a representation false in fact, made in published circulars of the corporation on which his name appeared as a director, but which representation was not known to him to be false.<sup>3</sup> But a director may be liable, personally, in damages for his fraudulent acts; <sup>4</sup> and he may be sued by one damaged by his assent

<sup>1</sup> *Amisina v. Goldthwaite*, 34 Tex. 125; *United Society v. Underwood*, 9 Bush (Ky.), 61.

<sup>2</sup> *Salmon v. Richardson*, 30 Conn. 360; *Calhoun v. Richardson*, id. 229; *Peck v. Gurney*, L. R. 6 H. L. 377; *Cornell v. Hay*, L. R. 8 C. P. 328; *Hallows v. Fernie*, L. R. 3 Eq. 520; *Henderson v. Lacon*, L. R. 5 Eq. 249; *Stewart v. Austin*, L. R. 3 Eq. 299; *Ship Crosskill*, L. R. 10 Eq. 73; *Mabey v. Adams*, 3 Bosw. (N. Y.) 346. And where a corporation has no authority to borrow money, but the directors receive money, and give a receipt therefor as if lent to the corporation, they are personally liable therefor. *Richardson v. Williamson*, L. R., 6 Q. B. 276; *Weeks v. Propert*, L. R. 8 C. P. 427.

<sup>3</sup> *Wakeman v. Dalley*, 61 N. Y. 27. See also *Bruff v. Mali*, 36 id. 200; *Arthur v. Griswold*, 55 id. 400; *Cazeau v. Mali*, 25 Barb. (N. Y.) 578; *Newberry v. Garland*, 31 id. 121; *Cross v. Sackett*, 2 Bosw. (N. Y.) 617; *Mabey v. Adams*, 3 id. 346; *Morse v. Swits*, 19 How. Pr. (N. Y.) 275.

<sup>4</sup> *Scott v. DePeyster*, 1 Edw. Ch. (N. Y.) 513; *Hodges v. N. E. Screw Co.*, 3 R. I. 9; *Crook v. Jewett*, 12 How. Pr. (N. Y.) 19. They cannot benefit themselves to the prejudice of creditors. *Richards v. New Hampshire Ins. Co.*, 3 Wend. (N. Y.) 130; *People v. Ballou*, 12 id. 277; *Tal-*

*madge v. Fishkill Iron Co.*, 4 Barb. (N. Y.) 382; *Butts v. Wood*, 38 id. 181. The directors of a banking or other corporation are, in the management of its affairs, only trustees for its creditors and stockholders, and are bound to administer its affairs according to the term of its charter and in good faith. If they fail in either respect they are liable to the party in interest, who is injured by it, for a breach of trust, and may be required to account to him in a court of chancery. *Hodges v. New Eng. Screw Co.*, 1 R. I. 312; *Bank of St. Mary's v. St. John*, 25 Ala. 566. But see *Patterson v. Baker*, 34 How. Pr. 180; *Winter v. Baker*, id. 183. The members of the governing body are the agents of the corporation; and if they exercise their functions for the purpose of injuring its interests and alienating its property, they are personally liable for any loss occasioned thereby. *Attorney-General v. Wilson*, 1 Craig & Ph. 1; 10 L. J. (N. S.) 53; 4 Jur. 1174. And if a director of a manufacturing company has assented to a dividend of more than the profits, he may be sued for such violation of duty without joining with him the company as co-defendant. *Hill v. Frazier*, 22 Penn. St. 320. See also *Kimmel v. Stoner*, 18 id. 155. If a director of a corporation knowingly issues or sanctions a prospectus containing false

to a dividend amounting to more than the profits, even without joining with him the company as a defendant.<sup>1</sup> And it has been held that a director is personally responsible, not only for fraud and wilful malfeasance, but also for his negligence, especially gross negligence. Thus, it has been held that every director would be personally liable for the fraudulent action of a board which he might have averted by an attendance at a board meeting, but by reason of his negligence or wilful inattention to his duty, he failed to attend; or if he attends the meeting, but fails to use his best judgment in opposing fraudulent acts, he would be liable for all the injurious consequences of his failure of duty, and which he might with reasonable care have averted. "Every absent director," observes MARTIN, J., "is equally responsible in case of extreme neglect in his attendance at the board, or in case after the act comes or must have come to his knowledge had he used due diligence, if he does not labor to avert its injurious consequences."<sup>2</sup> But, although directors may be liable and required to indemnify parties injured on account of their fraud and abuse of trust, they cannot be held personally responsible, where the injury is the result of mere misjudgment, or is only unwise, extravagant, improvident, slightly negligent, or a simple error in the performance of their duties. The only effectual remedy in such cases is to change the board and thereby the management of the corporate affairs.<sup>3</sup> But

statements of material facts, the natural tendency of which is to deceive, and to induce the public to purchase the corporate stock, he is liable to the damages sustained by one who, relying upon and induced by the statements, makes such a purchase. And it is sufficient to sustain the action that the false statements were one, although not the sole, inducement to the purchase. *Morgan v. Skiddy*, 62 N. Y. 319.

<sup>1</sup> *Hill v. Frazier*, 22 Penn. St. 320.

<sup>2</sup> Per MARTIN, J., in *Percy v. Mil-laudon*, 3 La. 575. See, also, *United Society v. Underwood*, 9 Bush (Ky.), 617.

<sup>3</sup> *Sears v. Hotchkiss*, 25 Conn. 171; *Howe v. Duel*, 43 Barb. (N. Y.) 504; *Belmont v. Erie R. Co.*, 52 id. 637; *Western Bank of Scotland v. Bairs*, L. R. 4 Ch. 381; *Turquand v. Marshall*, id. 376; *Speering's Appeal*, 71 Penn. St. 11; *Godbold v. Mobile Bank*, 11 Ala. 191; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *Bank of St. M. v. St. Johns*, 25

Ala. (N. S.) 566; *Pontchartrain, &c. R. R. Co. v. Paulding*, 11 La. 41. It is held in England that where directors assume to act for a company, they impliedly warrant their authority so to do; and that where they stated that they had appointed an agent with certain powers, they were personally liable without any proof of actual warranty, as that would be implied from the appointment of the agent. *Colonial Bank v. Cherry*, 17 W. R. 1031. So, directors may be liable for the fraudulent acts of co-directors, which they might have prevented. *Joint-Stock Discount Co. v. Brown*, 17 W. R. 1087. Where the directors of a railway assumed to act, by accepting bills of exchange, they were held personally liable. *Owen v. Van Ulster*, 10 C. B. 318; *Roberts v. Button*, 14 Vt. 195. See also *Turquand v. Marshall*, L. R. 6 Eq. 112. As to personal liability of directors for a check drawn by them in the name of a company, and signed by their individual names, where

for a wrongful disposition or appropriation of the corporate funds or property, they are liable; for as agents and trustees of the corporation, as well as the stockholders and creditors, they are bound to perform their duties and administer the trust in good faith; and any portion of the corporate property wrongfully received by them is liable to the satisfaction of the claims of creditors and stockholders; and they are required, in a proper proceeding, to account for the same. They have no right to enter into or participate in any combinations the object of which is to divest the corporation of its property, and obtain it for themselves, to the prejudice of the members or creditors.<sup>1</sup>

Neither have they the power to give away the corporate funds, or deprive the corporation of its means to accomplish the purposes for which it was chartered;<sup>2</sup> or dispose of the stock at less price than fixed by the charter;<sup>3</sup> or in a manner not provided by the charter;<sup>4</sup> or release subscriptions to the stock without payment of the same;<sup>5</sup> or to disregard a by-law imposing limitations on their powers; or to amend such by-laws or other regulations of the corporate body, so as to confer greater authority upon them. And a breach of duty in these respects would subject them to personal liability.<sup>6</sup> And a resolution of a board of directors, the design and effect of which is to transfer the property of the company to themselves, by way of inducement to pay their just debts to the company, is void.<sup>7</sup> So, for any wilful breach of trust, or misapplication of the corporate funds, or for any gross neglect of or inattention to their duties as trustees or directors, they are liable to any person who is damaged thereby.<sup>8</sup> Their fiduciary character is such that the law will not permit them to manage the affairs of the corporation for their personal and private advantage, or for the advantage of any particular

they were held personally liable, see *Serrell v. Derbyshire, &c. R. R. Co.*, 19 L. J. 371; s. c., 9 C. B. 811.

<sup>1</sup> *Jackson v. Ludeling*, 21 Wall. (U. S.) 616.

<sup>2</sup> *Bedford R. R. Co. v. Bowser*, 48 Penn. St. 29.

<sup>3</sup> *Sturges v. Stetson*, 3 Phil. (Penn.) 304.

<sup>4</sup> *Royalton v. Turnp. Co.*, 14 Vt. 311.

<sup>5</sup> *Bedford R. R. Co. v. Bowser*, 48 Penn. St. 29; *Penobscot, &c. R. R. Co. v. Dunn*, 39 Me. 587. Such an act is in derogation of the rights of the State, the

corporation, the stockholders, and the creditors. *Bedford R. R. Co. v. Bowser, ante.*

<sup>6</sup> *Stevens v. Davison*, 18 Gratt. (Va.) 819.

<sup>7</sup> *Hilles v. Parish*, 14 N. J. Eq. 380.

<sup>8</sup> *Robinson v. Smith*, 3 Paige Ch. (N. Y.) 222. See, also, *Hodges v. New England Screw Co.*, 1 R. I. 312; *Butler v. Cornwell Iron Co.*, 2 Conn. 335; *Colquitt v. Howard*, 11 Ga. 556; *Percy v. Millaudon*, 3 La. 568; *United Society v. Underwood*, 9 Bush (Ky.), 617. See also cases cited under the two previous sections.

class of stockholders, but their duty requires them to use reasonable efforts according to their best judgment and ability for the general interests of the corporation and its stockholders and creditors. Nor is it possible to limit the duty of a director of a corporation, in this respect, to the time while he was acting as director under any special delegation of power, or in attendance at meetings of the board. He cannot, while director, divest himself of the knowledge which he has acquired, in confidence, of corporate affairs, or of the value of corporate property, nor be allowed to use it to his own advantage,<sup>1</sup> or to the advantage of his friends.

A stockholder cannot have a separate action at law against the directors, but must proceed therefor in equity in such a manner as to protect the interests of the corporation, as the trustee of all the stockholders and creditors.<sup>2</sup> They may be made to account for breaches of trust,<sup>3</sup> and will be enjoined, at the suit either of the

<sup>1</sup> *Hoyle v. Plattsburgh, &c. R. Co.*, 54 N. Y. 314. See, also, *Koehler v. Black River Falls Co.*, 2 Black (U. S. C. C.), 715; *Risley v. Indiana &c. R. Co.*, 1 Hun (N. Y.), 202; *Gray v. N. Y. & Virginia S. Co.*, 3 id. 383; *Redmond v. Dickerson*, 9 N. J. Eq. 597; *Hoffman Steam Coal Co. v. Cumberland Coal Co.*, 16 Md. 456; *Goodin v. Whitewater Canal Co.*, 18 Ohio St. 169; *Port v. Russell*, 36 Ind. 60; *Buel v. Buckingham*, 16 Iowa, 284; *San Francisco R. Co. v. Bee*, 48 Cal. 398; *Drury v. Cross*, 7 Wall. (U. S.) 302; *Chicago, &c. R. Co. v. Howard*, id. 392; *Jackson v. Ludeling*, 21 id. 616; *Heath v. Erie R. Co.*, 8 Blatchf. (U. S. C. C.) 347; *European, &c. R. Co. v. Poor*, 59 Me. 277; *Richards v. New Hampshire Ins. Co.* 43 N. H., 263; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Peabody v. Flint*, 6 Allen (Mass.), 52; *Hodges v. New England Screw Co.*, 1 R. I. 312; *Butts v. Woods*, 37 N. Y. 317; *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201; *Ogden v. Murray*, 39 id. 207; *Bliss v. Matteson*, 45 id. 22; s. c., 52 Barb. 348; *Scott v. DePeyster*, 1 Edw. Ch. (N. Y.) 518; *Blatchford v. Ross*, 5 Abb. Pr. (N. Y.) 438; *Buffalo, &c. R. Co. v. Lampson*, 47 Barb. (N. Y.) 533; *Fremont v. Stone*, 42 id. 169; *Cumberland Coal Co. v. Sherman*, 30 id. 553; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 64. Nor can a stockholder who is also a creditor of the corporation, in

case of the insolvency of the company, or in the event that it is being wound up under the management of a receiver, be entitled to set off the amount due him, against lawful calls, nor to set off against such calls anticipated or probable dividends. *Ex parte Henry Winsor*, 3 Story (U. S. C. C.), 411; *Cutler v. Middlesex Factory Co.*, 14 Pick. (Mass.) 483; *McLaren v. Pennington*, 1 Paige (N. Y.), 102; *Osgood v. Ogden*, 4 Keyes (N. Y.), 70.

<sup>2</sup> *Craig v. Gregg*, 83 Penn. St. 19; *Greaves v. Gauge*, 69 N. Y. 154. The corporation in such cases should bring the action; but if it neglects or refuses to do so, the stockholders may sue, making the corporation a defendant. *Allen v. N. J. Southern R. R. Co.*, 49 How. Pr. (N. Y.) 14.

<sup>3</sup> *Ramsey v. Erie R. R. Co.*, 7 Abb. Pr. (N. Y.) n. s. 156; *Sears v. Hotchkiss*, 25 Conn. 156; *Belmont v. Erie R. R. Co.*, 52 Barb. (N. Y.) 637; *Howe v. Denn*, 43 id. 504; *Shea v. Knoxville, &c. R. R. Co.*, 6 Baxt. (Tenn.) 277; *N. Y. & New Haven R. R. Co. v. Schuyler*, 17 N. Y. 592; *Russell v. Wakefield Water Works Co.*, L. R. 20 Eq. 474; *McDougall v. Gardener*, 20 id. 383; *Hazard v. Durant*, 11 R. I. 195; *Marseilles Land Co. v. Aldrich*, 86 Ill. 504; *Gray v. N. Y. & Virginia Steamship Co.*, 3 Hun (N. Y.), 383; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Ottawa, &c. R. R. Co. v. Black*, 79 id. 262; *Gratz v. Redd*,

corporation or a stockholder, from wasting or misapplying the funds or property of the company.<sup>1</sup> By virtue of their position they only acquire the right to manage the business of the corporation, and do not acquire the right to destroy it by disposing of the corporate property essential for the prosecution of the corporate business;<sup>2</sup> and if they do so, or attempt to do so, any stockholder may, upon the neglect or refusal of the corporation to proceed against them, bring a suit in equity in behalf of all the stockholders against them, making the corporation and the party to whom the sale is made, or who is participating in the fraud, defendants in the action. Thus, in a New York case,<sup>3</sup> the plaintiffs were large stockholders in The New York and Virginia Steamship Company, which was incorporated under the laws of New York, to run a line of steamers between New York and Richmond, Virginia, and for other purposes. In July, 1867, while the company was doing a prosperous business, the defendants, who were directors of the company, for their own gain and advantage, and, as was alleged, for the purpose of defrauding the plaintiff and other stockholders, unlawfully and fraudulently sold to The Old Dominion Steamship Company, the other corporation defendant, all the steamers belonging to The New York and Virginia Steamship Company at a sum far less than their value, and received in pay therefor 4000 shares of the stock of The Old Dominion Steamship Company, which latter company was, when the action was brought, in posses-

4 B. Mon. (Ky.) 195; *Ryan v. Leavenworth, &c. R. R. Co.*, 21 Kan. 365; *Dewing v. Perdicardes*, 96 U. S. 193; *Pond v. Vt. Valley R. R. Co.*, 12 Blatchf. (U. S. C. C.) 280; *Bach v. Pacific Mail S. S. Co.*, 12 Abb. Pr. (N. Y.) n. s. 373; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Heath v. Erie R. R. Co.*, 8 Blatchf. (U. S. C. C.) 347; *Gray v. Lewis*, L. R. 8 Eq. 526; *Peabody v. Flint*, 6 Allen (Mass.), 52; *Atwood v. Merriwether*, L. R. 5 Eq. 464, n.; *Hoole v. Great Western R. R. Co.*, L. R. 3 Ch. 262; *Butts v. Wood*, 37 N. Y. 317; *Phoenix Bank v. Donnell*, 40 N. Y. 410; *Cunningham v. Pell*, 5 Paige Ch. (N. Y.) 607; *Abbott v. American Hand Rubber Co.*, 33 Barb. (N. Y.) 578; *Robinson v. Smith*, 3 Paige Ch. (N. Y.) 222; *Hussey v. Veazie*, 24 Me. 12; *Wright v. Oroville Mining Co.*, 4 Cal. 20; *Greaves v. Gauge*, 69 N. Y. 154; *Brewer v. Boston Theatre*, 104 Mass. 378; *Dodge v. Woolsey*, 18

*How.* (U. S.) 331; *Morgan v. New Orleans M. & C. R. R. Co.*, 1 Woods (U. S. C. C.), 15; *Mussina v. Goldthwaite*, 34 Tex. 135; *Kean v. Johnson*, 9 N. J. Eq. 401; *Gregory v. Patchett*, 33 Beav. 595; *Murch v. Eastern R. R. Co.*, 43 N. H. 515; *Lagrange v. State Treasurer*, 24 Mich. 468; *Cook v. Berlin Woollen Mill Co.*, 43 Wis. 433; *Foss v. Harbottle*, 2 Hane. 461; *Samuels v. Halladay*, Woolw. (U. S. C. C.) 400; *Cogswell v. Bull*, 39 Cal. 320.

<sup>1</sup> *Sears v. Hotchkiss*, *ante*; *Citizens' Loan Association v. Lyon*, 29 N. J. Eq. 110; *Gray v. N. Y. & Virginia S. S. Co.*, 3 Hun (N. Y.), 333.

<sup>2</sup> *Rollins v. Clay*, 33 Me. 132; *Abbott v. American Hand Rubber Co.*, 33 Barb. (N. Y.) 578.

<sup>3</sup> *Gray v. N. Y. & Virginia Steamship Co.*, 3 Hun (N. Y.), 333; *Drury v. Cross*, 7 Wall. (U. S.) 299; *Jackson v. Ludeling*, 21 Wall. (U. S.) 616.

sion of the vessels. The whole transaction was charged to have been done for the purpose of breaking up and ruining The New York and Virginia Steamship Company, for the personal benefit of the individual defendants and their confederates. The complaint further averred that the sale was made to, "and received and accepted by, The Old Dominion Steamship Company, with full knowledge that said directors had no right, power, or authority to make the sale and transfer, and that the same was made and consummated under some secret and fraudulent agreement between the directors and the defendant. The Old Dominion Steamship Company, its officers, and agents were to be mutually benefited, and were to derive large pecuniary profits and advantages at the expense of, and in fraud of, the rights of these plaintiffs and the other stockholders of The New York and Virginia Steamship Company." The complaint also averred that the directors of The New York and Virginia Steamship Company, "though requested so to do, have refused to take action or proceedings to recover back the steamships from the defendant, The Old Dominion Steamship Company."

The plaintiffs, in behalf of themselves and of all others interested with them who shall come in and seek relief by the action, asked several different kinds of relief; among which was a prayer that the alleged fraudulent sale of the steamships to The Old Dominion Steamship Company be set aside, and the property restored. The defendants separately demurred, but their grounds of demurrer were the same, although presenting somewhat different questions: first, that the complaint did not state facts sufficient to constitute a cause of action against each defendant demurring; second, that the plaintiffs, as stockholders in The New York and Virginia Steamship Company, had no right to maintain the action; and third, that the several causes of action were improperly united in the complaint; that is to say, that several causes of action stated in the complaint, were not common to all the defendants, but could only be maintained against some separately.

"In the discussion of these demurrers," said WESTBROOK, J., "it must of course be assumed that the allegations of the complaint are true; and the questions presented are,—

"1. Can a stockholder in a corporation, in behalf of himself and other stockholders similarly situated, maintain an action against such corporation and its directors, to set aside and enjoin transactions done by such directors, in the name of the corporation, for their own

personal gain and benefit, and in fraud of the rights of the plaintiffs and other *bona fide* stockholders, when the directors have been requested to bring such action and refused? It would seem that a bare statement of the proposition ought, of itself, to be sufficient. It would be monstrous to hold that a stockholder had no standing in court to protect his property in a corporation, which fraudulent managers, for their own gain, were misapplying. Such a rule would place every stockholder in a corporate body completely at the mercy, and in the power, of fraudulent trustees and directors. If the cases were not numerous where stockholders have been allowed to maintain bills in equity for frauds committed by directors, as Judge FANCHER truly said they were, we would now at least make a precedent for the maintenance of such an action, believing that sound public policy and the honest and discreet management of corporations require it. The right of the present plaintiffs to bring an action in behalf of themselves and others is recognized by section 119 of the Code, where it is, among other things, provided: 'When the parties are very numerous and it may be impracticable to bring them before the court, one or more may sue or defend for the benefit of the whole.'

"The general rule is, that a suit brought for the purpose of compelling the ministerial officers of a private corporation to account for breach of official duty or misapplication of corporate funds, should be brought in the name of the corporation, and cannot be brought in the name of the stockholders, or some of them. But as a court of equity never permits a wrong to go unredressed merely for the sake of form, if it appear that the directors of a corporation refuse in such case to prosecute, by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation is still under the control of those who must be the defendants in the suit, the stockholders, who are the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant. And if the stockholders are so numerous as to render it impossible, or very inconvenient, to bring them all before the court, a part may file a bill in behalf of themselves and all others standing in the same situation. The jurisdiction of chancery in such cases proceeds, in cases of joint-stock corporations, upon the same principles as are applied to charitable corporations in England. The directors are the trustees or managing partners, and the stockholders are the *cestuis que trustent* and have a joint interest in all the prop-

erty and effects of the corporation; and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy.

"In *Grant on Corporations*,<sup>1</sup> it is declared: 'A corporator may not only sue singly in equity the directors, etc., or the company, on behalf of himself and other shareholders, etc., but he may also join other parties as defendants, who may be receiving benefits from the transactions which he impeaches.' This doctrine contained in the elementary works has been repeatedly recognized in the courts.<sup>2</sup> In an action brought to foreclose a mortgage given by the defendant, William M. Hally, a stockholder, on petition showing that the directors did not intend to make defence, was allowed to appear and defend. The bill was dismissed, and the complainants appealed. The Supreme Court of the United States affirmed the decree. Mr. Justice DAVIS, writing the opinion, states the rule as it is stated *supra*, for the purpose of showing that a stockholder has a standing in court, to maintain or defend a suit which involves illegal or fraudulent acts of the directors of a joint-stock corporation. In another case,<sup>3</sup> the Supreme Court of the United States affirmed the same doctrine. Mr. Justice CAMPBELL says: 'The frame of the bill implies that this contract exceeds the powers of the corporation, and cannot be confirmed against a dissenting stockholder. His authority to file such a bill is supported upon this ground alone.'<sup>4</sup> The usual and more approved form of such a suit being that of one or more stockholders to sue in behalf of the others.'<sup>5</sup> There are also many other cases which hold the same principle.<sup>6</sup>

"The cases referred to abundantly establish that if the allegations of this complaint are true, there is a cause of action stated against The New York and Virginia Steamship Company and its directors. Upon their part, the appeal was argued as if it was necessary that

<sup>1</sup> Law Library (4th series), vol. 55, p. 301. DeG. & S. 562; *Moseley v. Alston*, 1 Phil. 790; *Wood v. Draper*, 24 Barb. (N. Y.) 84.

<sup>2</sup> *Koehler v. The Black River Falls*

*Iron Co.*, 2 Black (U. S.), 715.

<sup>3</sup> *Zabriskie v. Cleveland R. R. Co.*, 23 How. (U. S.) 381.

<sup>4</sup> *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Mott v. Penn. R. R. Co.*, 30 Penn. St. 1; *Manderson v. Commercial Bank*, 28 id. 379.

<sup>5</sup> *Bemon v. Rufford*, 1 Sim. (N. S.) 350; *Winch v. Birkenhead H. Railw. Co.*, 5

<sup>6</sup> Among these are *Robinson v. Smith*, 3 Paige Ch. (N. Y.) 222; *Cunningham v. Pell*, *ante*; *Peabody v. Flint*, 6 Allen (Mass.), 52; *Blatchford v. The N. Y. & New Haven R. R. Co.*, 5 Abb. Pr. (N. Y.) 276; *Cross v. Sackett*, 2 Bosw. (N. Y.) 617; *Butterworth v. Fox*, 15 How. Pr. (N. Y.) 545.



the complaint should justify all the relief prayed for, whereas it is sufficient if it states a cause of action, the demurrer assuming that none is averred. No opinion is expressed upon the extent of the relief which can be granted in this action. It seems very clear, however, if the truth of the allegations contained in the complaint be established, that the plaintiff will be entitled to the relief, at least, of setting aside the alleged fraudulent transfer of the corporate property. This would be justified, if the proofs supported the averments.

"2. Can the action be sustained against The Old Dominion Steamship Company, upon the allegations of the complaint? It is claimed in behalf of this defendant, that the present suit cannot be maintained, because the pleading states that that corporation has parted with its property for the vessels purchased of The New York and Virginia Steamship Company, and without restoring to it its property, the sale and purchase cannot be set aside.

"It is undoubtedly a general rule, that he who seeks to repudiate a contract with another upon the ground of fraud, must restore that which he has received. How this doctrine, however, can be made applicable in favor of this defendant, is not perceived. The complaint charges that The Old Dominion Steamship Company is co-conspirator with the other defendants to defraud the plaintiffs and those whom they represent, for its own benefit and that of its officers, as well as for the gain of the other defendants. Why should the plaintiffs be compelled to restore to it property which they do not control, and which such defendant, for the purpose of defrauding them, placed in other hands? The victims of a conspiracy (and such the plaintiffs are, according to the complaint, which the demurrer admits) surely ought not to be called upon to make good to one of the conspirators that which has been parted with for the express and only purpose of working a wrong to such victims. He who has been engaged in an attempt to defraud another, should be left to relieve himself as best he can; and as this corporation must, on this appeal, be regarded as occupying just that position, it will be left to establish its case by proof. When the cause is tried, and its exact status as to the transactions ascertained, a decree protecting its rights, if it has any worthy of being protected, can be made. Its demurrer is of no force, if the history of the dealings between the defendants, and the objects thereof, as stated in the pleading demurred to, be true.

"The authorities referred to above<sup>1</sup> establish that The Old Dominion Steamship Company, as one receiving benefits of the transactions which are impeached, is a proper party to the action. Occupying the position it does,—that of an active participant in a fraud upon the plaintiffs and their associates,—the argument based upon the doctrine of principal and agent does not apply. It is true that a principal who adopts a fraud of an agent, by taking its fruits, has no standing to maintain an action to set aside the fraudulent act; but surely, when the party implicated has aided the agent in committing a fraud upon a principal, and was, in fact, a party to it, he cannot make this point when the fruits of the transaction have not come into the principal's hands. The complaint shows that the stock of The Old Dominion Steamship Company, received in payment of the vessels, has not come into the treasury of the other corporation, and consequently the plaintiffs as stockholders have not been benefited. The plaintiffs and their associates have none of the property of this defendant, or the proceeds thereof in their hands; and if the complaint is true, and The Old Dominion Steamship Company is a loser by reason of its fraudulent attempt to entail a loss upon others for its own advantage, it will endure only that which it deserves to suffer." The demurrers were overruled.

So too, the sale of stock in a railroad company by the directors at a less rate than the price fixed in the charter, is a fraud upon the law and the stockholders. The issuing by the directors of a bond convertible into stock is the same in effect as the sale of so much stock, and the sale of such a bond at a discount is unlawful and void. Stock thus taken is, in the hands of a party with notice, subject to the right of prior subscribers to have it reduced to the charter value of the shares. A power given to the directors by the charter, to sell the property of the company, or notes and bonds belonging to it, does not apply to the capital stock; nor does the power to determine the time and terms of payment of subscriptions for stock have any reference to its price. The case is different in principle from the sale of stock on execution or under the charter on default of payment, in which case the gain or loss is that of the delinquent stockholder, the other stockholders not being in any way affected. It is not necessary that the charter should contain a prohibition against taking subscriptions at less than the charter price.<sup>2</sup>

<sup>1</sup> Grant on Corporations, p. 290; Peabody v. Flint, 6 Allen (Mass.), 52.

<sup>2</sup> Sturges v. Stetson, 1 Biss. (U. S. C. C.) 246.

A purchaser of stock illegally issued by the directors of a railroad company at less than the charter price, may rescind his contract, and recover from his vendor who participated in the illegal issue of the stock the money paid for his stock. The issue of the stock having been a fraud upon the law and stockholders, the purchaser, although the stock has been regularly transferred to him upon the books of the company, and there was nothing in the transaction, as to him, to awaken his suspicion, may elect his remedy, and is not bound to remain content with the stock transferred to him. A large amount of stock having been thus fraudulently issued, the prior stockholders being entitled to reduce it, in the hands of parties with notice, to the amount actually paid for, the fraud in which the vendor participated is material in its effects upon the rights of the purchaser.<sup>1</sup>

**SEC. 152. What must be shown, to sustain Suit against Directors by Stockholders.**—In equitable proceedings by shareholders of a corporation to obtain redress for loss on the value of the stock by reason of wilful and fraudulent mismanagement of the affairs of the corporation, by some of its directors, in order to make the directors personally liable, the proof, in support of the allegations *must be other than of mere constructive fraud or breaches of trust; there must be affirmative proof of the misconduct charged, going to establish fraud in fact.*<sup>2</sup> They are personally liable in equity, for the consequences of frauds or malfeasance, or for such gross negligence as may amount to a breach of trust, to the damage of the corporation or its stockholders; but they are not liable for the consequences of unwise or indiscreet management, if their conduct is entirely due to mere default or mistakes of judgment. And the *onus* of proof of fraud, combination, or gross negligence, to render them personally liable, is upon the party making the charges.<sup>3</sup> It is said in some of the cases that there is no legal presumption of illegality or unfairness in transactions between two corporations, from the mere fact that a portion of the board of directors in the one company constituted a part of the board of directors in the other at the same time, and participated in the dealings between the two corporations. *It is only when their*

<sup>1</sup> Fosdick v. Sturges, 1 Biss. (U. S. C. C.) 255. *quand v. Marshall*, L. R. 4 Ch. 376; *Hodges v. New Eng. Spring Co.*, 1 R. I. 312.

<sup>2</sup> *Charitable Corporation v. Sutton*, 2 Atk. 400; *Speering's Appeal*, 71 Penn. St. 1; *Overend v. Gurney*, L. R. 4 Ch. 701; *Overend v. Gibb*, L. R. 5 H. L. 480; *Tur-*

<sup>3</sup> *Booth v. Robinson*, 55 Md. 419.; *Flagg v. Manhattan R. R. Co.*, 20 Blatchf. (U. S. C. C.) 142.

*dealings are shown to be prejudicial to the one or other of the corporations represented by them, that their conduct will be subject to a strict and severe scrutiny by the courts.*<sup>1</sup> But the rule as expressed in the case last cited, it seems to us, is not the rule generally held in such case. And if, as is generally conceded, the directors of a railroad company, although not technically trustees, nevertheless stand in such a fiduciary relation to the stockholders as to rest under the disabilities of trustees, the doctrine of the Maryland case, *supra*, is not only contrary to the great weight of authority, but also to the salutary rule that trustees and agents will not be permitted to put themselves in a position where their interests may be adverse to their *cestuis que trustent*, or where such contract or relations are likely to bring them into conflict with their duty and self-interest, and tempt them to be unfaithful to the superior obligations they have assumed.<sup>2</sup> And this rule is so strict that, instead of the *cestui que trust* being obliged to prove that the transaction is fraudulent, unfair, or disadvantageous, *he is entitled to recover upon mere proof of the adverse relation, and the trustees will not be permitted to show that the transaction was in fact fair, honest, and advantageous to the corporation.*<sup>3</sup> "The mere fact of his assuming such a relation is an abuse of his trust and authority which may be taken advantage of by any *cestui que trust* whose interest is affected, and who has not assented thereto."<sup>4</sup> The rule is well expressed by Mr. SUGDEN<sup>5</sup> as follows:

<sup>1</sup> ALVEY, J., in *Robinson v. Booth*, 55 Md. 419. In *Cumberland Coal Co. v. Parish*, 42 id. 598; *Watt's Appeal*, 78 Penn. St. 370; *Ashurst's Appeal*, 60 id. 290, — the burden of proving fairness is put upon the trustee. But *Merrick v. Peru Iron Co.*, 61 Ill. 472, and *Buel v. Buckingham*, 16 Iowa, 284, agree with the principal case, and place the burden of proving fraud upon the stockholder. See also *United States Rolling Mills Co. v. Atlantic, &c. R. R. Co.*, 34 Ohio St. 450.

<sup>2</sup> *Pierce on Railroads*, 36; *Butts v. Wood*, 37 N. Y. 317; *Blake v. R. R. Co.*, 56 id. 485; *Koehler v. Black River Falls Iron Co.*, 2 Black (U. S.), 715; *Bliss v. Matteson*, 45 N. Y. 25; *Barnes v. Brown*, 80 id. 527; *Duncombe v. N. Y., &c. R. R. Co.*, 84 N. Y. 190; *Robinson v. Smith*, 3 Paige Ch. (N. Y.) 222; *Pearson v. Con-*

*cord R. R. Co.*, 59 N. H. —; *Munson v. Syracuse, &c. R. R. Co.*, 29 Hun (N. Y.), 76.

<sup>3</sup> *Aberdeen Ry. Co. v. Blakie*, 1 Macq. 461; *Pearson v. Concord R. R. Co.*, 59 N. H. —; *Gilman, &c. R. R. Co. v. Kelly*, 77 Ill. 426; *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. L. 505; *Flint, &c. R. R. Co. v. Dewey*, 14 Mich. 477; *Wardell v. Union Pacific R. R. Co.*, 103 U. S. 651; *Marsh v. Whittemore*, 21 Wall. (U. S.) 178.

<sup>4</sup> *Remick v. Butterfield*, 31 N. H. 70; *Ashuelot R. R. Co. v. Elliott*, 57 N. H. 397; *Hoitt v. Webb*, 36 id. 158; *Hoitt v. Russell*, 56 id. 559. An agent cannot make a profit to himself out of the business intrusted to him, beyond his compensation. *Bain v. Brown*, 56 N. Y. 285; *Marvin v. Buchanan*, 62 Barb. (N. Y.) 468; *Duncombe v. N. Y. & Housatonic*

<sup>5</sup> *Sugden's Vendors and Purchasers*, 392.

"He that is intrusted with the interest of others cannot be allowed to make the business an object of interest to himself; because from the frailty of nature one who has the power will too readily be seized with the inclination for using the opportunity to his interest, at the expense of those for whom he is interested."<sup>1</sup>

The same person cannot act for himself, and at the same time, with respect to the same matter, as the agent for another whose interests are conflicting. Thus, a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and constituted as humanity is, in the majority of cases duty would be overborne in the struggle.<sup>2</sup> The law, therefore, will always condemn the transaction of a party on his own behalf when, in respect to the matter concerned, he is an agent of others, and will relieve against it whenever its enforcement is seasonably resisted. Directors of cor-

R. R. Co., 84 N. Y. 190; *Blake v. Buffalo Creek R. R. Co.*, 56 N. Y. 485. Nor can he acquire an interest in the property which is the subject of his agency adverse to his principal. *Parkist v. Alexander*, 1 Johns. Ch. (N. Y.) 394; *Reed v. Warner*, 5 Paige Ch. (N. Y.) 650; *Bruce v. Davenport*, 36 Barb. (N. Y.) 349; *Cram v. Mitchell*, 1 Sandf. Ch. (N. Y.) 251. And if he is entrusted with the sale of real estate or other property, cannot, directly or indirectly, become the purchaser thereof under the power conferred upon him. *Dobson v. Racey*, 3 Sandf. Ch. 60; 8 N. Y. 216; *Little Rock & Fort Smith R. R. Co. v. Page*, 35 Ark. 304. The policy of the law forbids an agent, by any underhand management or device, from becoming the owner of his principal's property employed in or about the agency. *Holloway v. Stevens*, 1 Hun (N. Y.), 308; 2 id. 384; *Bain v. Brown*, 56 N. Y. 285. And an agent employed to sell goods for his principal cannot himself become the purchaser. *McDonald v. Lord*, 2 Rob. (N. Y.) 7; s. p. *Bain v. Brown*, 56 N. Y. 285. Thus, an agent employed to collect a mortgage cannot purchase the premises at the sale for his own benefit, *though he bids more than the price limited by his principal*. *Moore v. Moore*, 4 Sandf. Ch. 37, 5 N. Y. 256. And see *Wilson v. Wilson*, 4 Keyes

(N. Y.), 413. Whatever is received by an agent from third persons in the business of his principal, either as profits or compensation, belongs to the principal. *Howe v. Savory*, 51 N. Y. 631; *Morrison v. Ogdensburgh & Lake Champlain R. R. Co.*, 52 Barb. (N. Y.) 173; *Minnesota Central R. R. Co. v. Morgan*, 52 id. 217. Affirmed by the Court of Appeals. So an agent employed to examine and ascertain how much and what part of the lands of his principal can be sold without inconvenience, and to set off by metes and bounds such portions as he shall deem advisable, and report his proceedings to his principal, cannot, after examining the property and recommending a sale of a portion thereof, purchase the property, and take a conveyance thereof for his own benefit. In such case the principal may vacate the sale, both as against the agent and those to whom he has conveyed with notice of the facts. *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553.

<sup>1</sup> See also *FIELD, J.*, in *Wardell v. Union Pacific R. R. Co.*, 103 U. S. 651; *Marsh v. Whittemore*, 21 Wall. (U. S.) 183; *Currier v. Green*, 2 N. H. 225; *Hoyle v. Plattsburgh, &c. R. R. Co.*, 54 N. Y. 314.

<sup>2</sup> *Marsh v. Whittemore*, 21 Wall. (U. S.) 183.

porations, and all other persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence, all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration<sup>1</sup> by

<sup>1</sup> FIELD, J., in *Wardell v. Union Pacific R. R. Co.*, 103 U. S. 261; *Great Luxembourg Co. v. Magnay*, 25 Beav. 586; *Benson v. Heathorn*, 1 Y. & C. 826; *Flint & Pere Marquette R. Co. v. Dewey*, 14 Mich. 477; *European & N. American R. Co. v. Poor*, 59 Me. 277; *Drury v. Cross*, 7 Wall. (U. S.) 299. In *Goodin v. Cincinnati, &c. Canal Co.*, 18 Ohio St. 169, a railroad company having purchased a majority of the shares of stock in a canal company, elected for the latter a board of directors who were in the interest of the railroad company, and then, with the assent of said board, appropriated the entire canal and property of the canal company as a railroad track, paying therefor a price or compensation which was agreed upon by the directors of the two companies, but which was far below the actual value of the property. It was held that, although the stockholders and creditors of the canal company could not, after the road had been completed, reclaim the property, or enjoin its use, yet they were not concluded by such agreement, so far as regarded the price of the property, but could, by action, compel the railroad company to account for its additional value; and as such a sale was in effect a sale by a trustee to himself, the vendor and purchaser were in the same interest. It was

the duty of the managing directors of the vendor company, as such, to obtain the highest price for the property, while, as stockholders in the purchasing company, it was their interest to buy it as low as possible; and the fact that a majority of the stockholders of the vendor company, as well as the directors, might have personal interests in conflict with those of the company could make no difference. A director does not represent the stockholders as *persons*, nor does he represent *their personal interest*. He represents them as stockholders, and their interests as such. He is trustee for the company; and whenever he acts against its interests, — no matter how much he thereby benefits foreign interests of the individual stockholders, or how many of the individual stockholders act with him, — he is guilty of a breach of trust; and a court of equity will set his acts aside at the instance of stockholders or creditors who are damnified thereby. Any act of the director by which they intentionally diminish the value of the stock or property of the company is a breach of trust; for which any of the stockholders or creditors may justly complain, although all the other stockholders and creditors are benefited in some other way more than they are injured as such.

a stockholder who has in no wise assented to the contract either before or since the fact, and has made timely application for relief.<sup>1</sup> The reason for the exclusion of all inquiry into the *bona fides* of the transaction, or whether it is beneficial to the *cestui que trust* or not, is "because the inquiry is so easily baffled in a court of justice."<sup>2</sup> "It is to avoid the necessity of any such inquiry, in which justice might be balked, that the rule takes so general a form."<sup>3</sup> "The rule is founded in the known weakness of human nature, and the peril of permitting any sort of collusion between the personal interests of the individual and his duties as trustee in his fiduciary character."<sup>4</sup> "It is founded in the danger of imposition *and the presumption of the existence of fraud* which is inaccessible to the eye of the court. *The policy of the rule is to shut the door against temptation.*"<sup>5</sup> "It is not enough for the trustee to say, 'You cannot prove fraud;' as it is in his power to conceal it."<sup>6</sup> "It is *presumptio juris et de jure* that when a person stands in these inconsistent relations of both buyer and seller there are dangers; and it is not relevant to say it is impossible that there could be any in the particular case."<sup>7</sup> "*It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is trustee may be as good as could have been obtained from any other person; they may even at the time have been better. But still, so inflexible is the rule that no inquiry on that subject is permitted.*"<sup>8</sup> "When agents and others acting in a fiduciary capacity

<sup>1</sup> Gilman, &c. R. R. Co. v. Kelly, 77 Ill. 426; Flint, &c. R. R. Co. v. Dewey, 14 Mich. 477; Yeackell v. Litchfield, 13 Allen (Mass.), 417; Coles v. Trethcock, 9 Ves. 234; Michoud v. Girod, 4 How. (U. S.) 503; Sparhawk v. Allen, 21 N. H. 9; Dwight v. Blackmer, 2 Mich. 330; Clute v. Barron, 2 id. 192; Raisin v. Clark, 41 Md. 158; Rice v. Wood, 113 Mass. 133; Goodin v. Canal Co., 18 Ohio St. 169; Monroe v. Allaine, 2 Caines (N. Y.), 183; Buel v. Buckingham, 16 Iowa, 284; *Ex parte* Hughes, 6 Ves. 617; Allen v. Bryan, 7 Ired. (N. C.) Eq. 276; Hatch v. Hatch, 9 Ves. 297; White v. Trotter, 22 Miss. 30; Green v. Sargeant, 23 Vt. 466; Van Epps v. Van Epps, 9 Paige Ch. (N. Y.) 237; Barnes v. Brown, 80 N. Y. 527; Holt v. Holt, 1 Ch. Cas. 190; Keech v. Sanford, 3 Eq. Cas. Abr. 741; Gardiner v. Ogden, 22 N. Y. 327;

Duncombe v. N. Y. &c. R. R. Co., 84 id. 190; Coleman v. Second Av. R. R. Co., 38 id. 201; Jewett v. Miller, 10 id. 402; Aberdeen Railw. Co. v. Blaikie, 1 Macq. 461; Lewis v. Hillman, 3 H. L. Cas. 607; *Ex parte* James, 8 Ves. 387; Whelpdale v. Cookson, 1 Ves. Sr. 8; Cumberland Coal Co. v. Sherman, 30 Barb. (N. Y.) 553.

<sup>2</sup> Lord ELDON in Hatch v. Hatch, 9 Ves. 297.

<sup>3</sup> Jewett v. Miller, 10 N. Y. 402.

<sup>4</sup> Duncombe v. N. Y. &c. R. R. Co., 84 N. Y. 190.

<sup>5</sup> Van Epps v. Van Epps, 9 Paige Ch. (N. Y.) 237.

<sup>6</sup> Lord HARDWICKE in Whelpdale v. Cookson, 1 Ves. Sr. 8.

<sup>7</sup> Lord JAFFREY in Hughes v. Watson, Scotland, 1846.

<sup>8</sup> Lord CRANWORTH in Aberdeen

understand that these rules will be enforced *even without proof of actual fraud* the honest will keep clear of all dealings falling within the prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it.”<sup>1</sup> Such acts are treated as a fraud in law, and no proof that it was not a fraud in fact can overcome the presumption arising therefrom.<sup>2</sup> These rules were all applied in a recent case in New Hampshire.<sup>3</sup> In that case the managers of two railroads connecting with the defendant railroad, purchased a majority of the stock of the defendant company, and became directors of the defendant company, for the purpose of making contracts with the defendant company more favorable to their companies than the existing ones. SMITH, J., states the facts and the questions involved thus: “The gist of the referee’s report is, that the two upper roads (*i. e.*, the managers of the two upper roads, acting in the interests of those roads) bought a controlling interest in the stock of the Concord Railroad for the purpose of making with themselves, as controlling managers of the Concord road, contracts more favorable to themselves; and they accomplished that purpose. The upper roads having bought Concord Railroad stock for the purpose of controlling that road for their own advantage, having exercised their control of it by making certain contracts with themselves, and having passed the vote of indemnity for their own benefit, the question is whether they can be allowed, against the objection of a stockholder in the Concord road, to execute their illegal contracts and their illegal vote, on the ground that the contracts and vote are just and fair, and such as the Concord road ought to have made and passed. We do not stop to inquire how much weight is to be given to the findings of the referee in respect to the justness of these contracts, or the validity of these claims of the upper roads against the Concord. The Concord road being in the control and management of the upper roads, such defence was made before the referee as a management hostile to its interests, wherever

Railw. Co. v. Blakie, 1 Macq. 461. See also Michoud v. Girod, 4 How. (U. S.) 503; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; York Buildings Co. v. Mackenzie, 8 Bro. P. C. 42; Pearson v. Concord R. R. Co., 59 N. H. —.

<sup>1</sup> Bain v. Brown, 56 N. Y. 288; Farmers’, &c. Bank v. Downey, 53 Cal. 466; 31 Am. Rep. 62; Davis v. Rock Creek, &c. Co., 55 Cal. 359; 36 Am. Rep. 42.

<sup>2</sup> Coburn v. Pickering, 3 N. H. 415.

<sup>3</sup> Pearson v. Concord R. R. Co., 59 N. H. The opinion of SMITH, J., in this case, contains a masterly review of the cases, and a clear and succinct statement of the principles involved, and will necessarily rank as a leading authority in questions under this head.



they conflicted with those of the upper roads, chose to make. In the view which we take of this case, we regard his findings in this respect as immaterial, and answer the question in the negative."

The court held that the contract was invalid, and that neither the good faith nor the fairness of the transaction could be considered.<sup>1</sup>

<sup>1</sup> SMITH, J., in the course of his opinion, says: "The immediate government and direction of the affairs of the Concord Railroad are, by its charter, vested in a board of seven directors, to be chosen by the members of the corporation. In this respect the stockholders have no voice and no vote. They are as powerless as a ward in the hands of his guardian. The law requires of a guardian self-denial, integrity, diligent attention, an eye single to the interest of his ward, and that he be above mercenary motives, — *Sparhawk v. Allen*, 21 N. H. 9, 26, — qualities no less requisite in a director in the discharge of his duty. To whom shall the stockholders look with confidence that their interests will be protected but to their directors? And when the stockholders' interests are sacrificed or threatened, they have no other resort for protection except to a court of chancery. We think this is a case where the law is called upon to interpose its aid in behalf of the stockholders. *March v. Eastern R. R. Co.*, 40 N. H. 548, 567. We do not say that the contracts made by the defendants for rates over the lower roads are not fair and just; nor that the upper roads have not valid and legal claims against the Concord road. These questions cannot be litigated or contested with the upper roads by a board of Concord railroad directors whose interests are opposed to those of the Concord road, and are in harmony with those of the upper roads. In the making of these contracts, and in the settlement of these claims, the stockholders of the Concord road have the legal right to the services of directors whose interests are not hostile to their interests. A director or stockholder in the Northern, or Boston, Concord, and Montreal road is not such a director. It may, for most purposes, be convenient and desirable that the same person or persons should act as directors of two or more roads forming parts of a continuous line. For many

purposes their interests are not adverse. The harmonious working of the several parts, when a large portion of its business is the transportation of goods and passengers over the whole line, requires unity of purpose and management. But however all this may be, it cannot displace or override the rights of the stockholders of a single road, that it shall be operated primarily in their own interest. In England, Parliament has declared by statute (8 & 9 Vict., ch. 16) that no person interested in any contract with a corporation shall be capable of being a director thereof; and if any director shall directly or indirectly be concerned in any contract with the corporation, his office shall become vacant. The office becomes vacant, although in a suit at law between the parties upon such a contract the contract is not held void. *Foster v. Oxford, &c. R. Co.*, 13 C. B. 200; 76 E. C. L. 200. Such contracts are voidable in equity at the suit of a stockholder. We have no such statute, but reason and common sense, and all the analogies of the law, forbid that a person should act in a position of trust where self-interest conflicts with duty. The consciences of men in such positions will not stand the strain of self-interest. We approve the remarks of WELCH, J., in *Goodin v. Canal Co.*, 18 Ohio St. 169: 'A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign. No matter if a majority of the stockholders as well as himself have personal interests in conflict with those of the company. He does not represent them as persons or represent their personal interest. He represents them as stockholders, and their interests as such.' *Rolling Stock Co. v. Railroad Co.*, 34 Ohio St. 465, was a stockholders' bill for an injunction.

**SEC. 153. Powers of Directors.**—The powers of directors of a railroad or any other corporation are, as we have seen, such as are expressly conferred by the charter, and by-laws made in pursuance thereof, and such as are incidental to or implied from the nature and character of the business, and the customary methods of transacting it; and, except in so far as they are expressly or impliedly restrained by the charter, by-laws, or general law, they may do any act which the corporation itself can do or ratify.<sup>1</sup> Their authority may be said

The plaintiff's board of five directors were members of the defendant's board of thirteen. The bill was dismissed because not seasonably brought, and the remarks of the court to the effect that the agreement sought to be set aside was valid because executed by a majority of the board without the interested directors, would seem to be *dicta*. *Ashurst's Appeal*, 60 Penn. St. 291, and *Watts' Appeal*, 78 id. 370, are sometimes cited to the point that contracts or sales made by a board of directors with or to some of their number, may be sustained in equity; and the remarks of the court are to the point that such contracts and sales may be upheld if their perfect fairness is shown. These cases were stockholders' bills to set aside sales of property, upon the ground of a violation of fiduciary duty. Relief was denied upon the ground that the applications came too late. *Flagg v. Manhattan R. R. Co.*, 20 Blatchf. (U. S. C. C.) 142, decides that where an agreement is made by the directors relinquishing the right to a guaranty of dividends to a corporation by another corporation, the execution of the agreement will not be enjoined at the suit of a stockholder, because three of the directors voting were also stockholders in the guarantor corporation, it appearing that without counting their votes, a majority of the directors voted for the measure. So far as we are able to discover, this case stands alone, unsupported by a single authority in this country or in England. In *Butts v. Wood*, 38 Barb. 181; s. c., 37 N. Y. 317, the action of a majority of two in a board of three, passing upon the claim of a third director, who also voted, was set aside at the instance of one of the stockholders. See also *Wardens of St. James v. Rector Church of Redeemer*, 45 Barb.

(N. Y.) 456; *Kitchen v. Railroad Co.*, 69 Mo. 224; *Kelly v. Railroad Co.*, 77 Ill. 426; *Koehler v. Black River, &c. Co.*, 2 Black (U. S.), 720; 1 *Perry on Trusts*, § 207, and cases; *Pierce on Railroads*, 36-40, and cases; *Green's Brice's Ultra Vires*, 477, n. (a) and cases. Stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussion. *Ogden v. Murray*, 39 N. Y. 202, 207; *Aberdeen Ry. Co. v. Blakie*, 1 Macq. H. L. Cas. 461, where the court said: 'It was Mr. Blakie's duty to give to his co-directors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject.' In *Barnes v. Brown*, 80 N. Y. 527, 536, the court said: 'If he (plaintiff) had attempted to perform the contract while he was director, the stockholders could probably have intervened by some suit in equity adapted to the nature of the case, to nullify the contract as to him, or to restrain him as to the performance thereof, or to compel him to elect to resign his office of director or to give up the contract.' However much the authorities may differ in other respects, we have found in our examination no case that upholds an interested director in taking part in the action or deliberation of a board in regard to a subject in which he was personally interested, either alone or with other contracting parties. Our conclusion upon this part of the case is, that for the purpose of making contracts with the upper roads, and settling the claims of those roads against the Concord road, no director or stockholder in those roads can act as a director of the Concord road."

<sup>1</sup> *Bank of Middlebury v. Rutland & Washington R. R. Co.*, 30 Vt. 159; *Gor-*

to be original rather than delegated, for, although the stockholders elect the directors, *their power and authority is derived from the charter*,<sup>1</sup> and while the stockholders, by electing them to the office, are instrumental in clothing them with authority, yet they do not stand in the relation of principals; and, except when certain powers are expressly reserved to the stockholders by the charter, the direc-

don v. Preston, 1 Watts (Penn.), 385; Whitwell v. Warner, 20 Vt. 425; Wright v. Oraville Mining Co., 40 Cal. 20. If the management of a corporation is committed to the directors by the charter, they alone have the power to manage and control its business, and the honest exercise of their judgment within the provisions of the corporate powers is absolute and exclusive. U.S. Bank v. Dandridge, 12 Wheat. (U. S.) 112, and the stockholders have no right to interfere. Their remedy for mismanagement, resulting from a lack of ability or judgment on the part of these agents, is to make a change of them at a proper meeting held for that purpose. In this way a change of management and of the business policy may be effected to suit the interests or the wishes of a majority of the members. On the subject of the exclusiveness of the authority of the directors of a corporation, and their exemption from any interference on the part of the stockholders, and their right to control and manage the corporate affairs, within the scope of the authority conferred upon them, it may be said that it may well be doubted whether a general meeting of the stockholders of a corporation could be legally held for any other purpose than the selection of a board of directors. Such a meeting as to any other purpose or object could only be advisory to the board of directors. It would have no power to take under its charge or put under the charge of others the affairs of the company. The president and directors of a corporation have been said to be the agents of the stockholders; but this expression must be understood in view of, and must be limited to, the subject under consideration. In anything like a general or universal sense, it will be readily seen that it cannot be true. Dayton, &c. R. R. Co. v. Hatch, 1 Dis. (Ohio) 84; Whitwell v. Warner, 20 Vt. 425; Com. v. Roman Cath. Soc., 6 S. & R.

508; Ridgway v. Farmers' Bank, 12 id. 256; Bank of Kentucky v. Schuylkill Bank, 1 Pars. Sel. Cas. 180; State v. Bank of Louisiana, 6 La. 745; Salem Bank v. Gloucester Bank, 17 Mass. 29, where it is held that, if the general power of making by-laws is left by the charter to the corporation at large, the power of the board of directors may be circumscribed by them. In Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27, a lease was made by the stockholders instead of the directors, and the charter provided for a board of directors of the corporation with general powers. The court say: "It is quite obvious from the charter, that the company could do no act except through the directors. When the charter prescribes the mode of its action, its injunctions must be rigidly pursued. . . . The stockholders in this case had no power to make a lease or do any other administrative act in the management of the affairs of the corporation. If a case could be made at all, it could be executed only in pursuance of an act of the directors, who are appointed by the charter for the management of its affairs. It is no answer that individual stockholders, who were present at the meeting when the lease was ordered, were also directors. They did not meet or act as directors, but as stockholders."

<sup>1</sup> Dana v. Bank of United States, 5 W. & S. (Penn.) 223; Bank of Middlebury v. Rutland & Washington R. R. Co., ante; Chetlain v. Republic, &c. Ins. Co., 86 Ill. 220; State v. Smith, 48 Vt. 266; Miller v. R. & W. R. R. Co., 36 Vt. 452; Wright v. Oraville Mining Co., 40 Cal. 20; Dayton, &c. R. R. Co. v. Hatch, 1 Dis. (Ohio) 84; Hoyt v. Thompson, 19 N. Y. 207; Shaw v. Norfolk Co. R. R. Co., 16 Gray (Mass.), 407; Watt's Appeal, 78 Penn. St. 370; Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27; Wood Hydraulic Hose, &c. Co., 45 Ga. 34.

tors are invested with the exclusive right to govern and manage the business of the corporation.<sup>1</sup>

The implied powers of directors are such as are incident to the prosecution of the business, and as are necessary to accomplish the objects and purposes for which the corporation was formed, and for the performance of their duties; and they are much more numerous than their express powers. It is hardly necessary to say that they have no authority to do an act which the corporation itself has not the power to do or ratify; but unless restricted by the charter, by-laws, or usage, they may ordinarily do any act which the corporation can do.<sup>2</sup> The question as to what their implied powers are, is necessarily one of construction, and the act done is to be regarded first in reference to the express powers conferred, and second, in view of the necessities and convenient and economical management and prosecution of the business. In the case of railroad corporations, the nature of the business and the interests involved necessarily requires that large discretion and extensive powers should be invested in and exercised by them; and so long as they keep within the scope of the powers delegated to the corporation and to them, under the charter and by-laws, their power is supreme as to the corporate management. It would be impracticable to specify in detail what acts they may do; and it would be equally so to point out what they may not do. They are agents of the corporation; and as a rule, in this country, but very few powers of control are reserved to the corporation by the charter, except the right to elect the officers and to pass upon questions of leasing or selling the franchises and property of the corporation, or consolidating with other corporations; and in every instance in order to ascertain what the powers of the directors are, the charter should be looked to, and *all powers not reserved to the stockholders are possessed by the directors.*<sup>3</sup> The directors are made the agents of the corporation, not of the stockholders; consequently while they may take the advice of the stockholders upon a matter within the scope of their powers, yet they are not bound to act in accordance with such advice, however expressed. "The delegation of power to the directors is exclusive."<sup>4</sup> The management and direc-

<sup>1</sup> See note 1, p. 399.

<sup>2</sup> *Gordon v. Preston*, 1 Watts (Penn.), 388; *Whitwell v. Warner*, 29 Vt. 425; *Burrill v. Nahant Bank*, 3 Met. (Mass.) 163; *Augusta Bank v. Hamblett*, 35 Me. 491; *Hoyt v. Thompson*, 19 N. Y. 207; *Bank of Middlebury v. Edgerton*, 30 Vt.

182; *Bank of Middlebury v. R. & W. R. R. Co.*, 30 id. 159; *Dispatch Line, &c. v. Bellamy*, 12 N. H. 225.

<sup>3</sup> *Dana v. United States Bank*, 5 W. & S. (Penn.) 246.

<sup>4</sup> *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 2 Col. 556.

tion of the affairs of the corporation are committed to them, and they are the representatives of it, and they alone have the power to manage its concerns, and are necessarily left to exercise their own best judgment and discretion. The stockholders have no right to interfere with or exercise any control over the management by the directors.<sup>1</sup> "It might well be doubted," say the court in an Ohio case,<sup>2</sup> "whether a general meeting of the stockholders could be legally held for any other purpose than the selection of a board of directors. Such a meeting, as to any other purpose or object, could only be, in its character, advisory to the board of directors. It would have no power to take under its charge, or put under the charge of others, the affairs of the company. The president and directors of such a corporation as the plaintiff have been said to be the agents of the stockholders; but this expression must be understood in view of, and must be limited to, the subject under consideration. In anything like a general or universal sense, it will be readily seen that it cannot be true. Indeed, so far as third persons, and especially the government or creating power of the corporation are concerned, the president and directors, and the stockholders, may rather be considered as the members and limbs, each acting within its appropriate sphere, of that artificial being, or entity, to which the name and powers of the corporation have been assigned by the law of its creation. When, therefore, a question arises, by whom the conferred powers are to be exercised, it will be determined rather by the law of the creation of the company, showing in each case on whom the governing or controlling power has been conferred, than by any consideration of the rights and interests of those concerned in the corporation, as among themselves." In a New York case,<sup>3</sup> a lease was declared void because made by the authority of the stockholders instead of the directors. The court say: "It is quite obvious from the charter, that the company could do no act except through its directors. When the charter prescribes the mode of its action, its injunctions must be rigidly pursued. . . . The stockholders in this case had no power to make a lease, or do any other administrative act in the management of the affairs of the corporation. If a lease could be made at all, it could be executed only in pursuance of the act of the directors, who are the body appointed

<sup>1</sup> *United States v. Dandridge*, 12 Wheat. (U. S.) 213.

<sup>3</sup> *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27.

<sup>2</sup> GHOLSON, J., in *Dayton, &c. R. R. Co. v. Hatch*, 1 Dis. (Ohio) 84.

by the charter for the management of its affairs. It is no answer, that individual stockholders who were present at the meeting when the lease was ordered, were also directors. They did not meet or act as directors, but as stockholders."<sup>1</sup> But where the act contemplated involves a fundamental change, which was not contemplated in the charter, and which directly affects the interests of the stockholders, and the charter contains no provision in reference thereto, it would seem that the assent of the stockholders is necessary. Thus, where the charter of a railroad company does not contain a reservation by the legislature of the power to amend or repeal it, the stockholders, and not the directors, are the proper parties to accept or reject an amendment thereto.<sup>2</sup> Thus, in the New York case cited,<sup>3</sup> the court held that in the absence of a provision in the charter giving them that power, the directors had no authority to increase the capital stock. The court said: "A change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed in the charter, cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. . . . Changes in the

<sup>1</sup> *Fleckner v. U. S. Bank*, 8 Wheat. (U. S.) 338; *Whitwell v. Warner*, 20 Vt. 425; *Com. v. Trustees of St. Mary's Church*, 6 S. & R. (Penn.) 508; *Ridgway v. Farmers' Bank of Bucks Co.*, 12 S. & R. (Penn.) 256; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. (Penn.) 180; *Gashwiler v. Willis*, 33 Cal. 11; *State of La. v. Bank of La.*, 6 La. 745. Where the corporate powers are vested in a board of directors or trustees the powers of the trustees are exclusive and the proceedings of a stockholders' meeting cannot be shown to establish a disavowal, by the corporation, of the acts of one who, without authority, has assumed to contract for it. *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 2 Col. 565. But if the general power of making by-laws is left by the charter to the corporation at large, the power of the board of directors may be circumscribed by them as to any matter which is not by the charter expressly conferred upon them. *Salem Bank v. Gloucester Bank*, 17 Mass. 29.

<sup>2</sup> *Witter v. Mississippi, &c. R. R. Co.*, 20 Ark. 463; *Fry v. Lexington, &c. R. R. Co.*, 2 Met. (Ky.) 314; *Joy v. Jackson, &c. Plank Road Co.*, 11 Mich. 155; *In re Wheeler*, 2 Abb. Pr. (N. Y.) n. s. 361; *Railway Co. v. Allerton*, 18 Wall. (U. S.) 233; *Black v. Del. & Rar. Canal Co.*, 22 N. J. Eq. 133. And the consent of *all* the stockholders is essential, and where the change is fundamental, no majority, however large, can compel the minority of the stockholders to submit to it. *Kean v. Johnson*, 9 N. J. Eq. 401; *McCrary v. Junction R. R. Co.*, 9 Ind. 358; *Winter v. Muscogee R. R. Co.*, 11 Ga. 438. But the change must be substantial. *Sprague v. Ill. R. R. Co.*, 19 Ill. 177; *Middlesex T. Co. v. Locke*, 8 Mass. 268; *Proprietors v. Towne*, 1 N. H. 44; *Zabriskie v. Hackensack, &c. R. R. Co.*, 18 N. J. Eq. 178.

<sup>3</sup> *In re Wheeler, ante*. See *Atlantic, &c. R. R. Co. v. St. Louis*, 66 Mo. 228; *Durpee v. Old Colony R. R. Co.*, 5 Allen (Mass.), 230; *Goodin v. Evans*, 18 Ohio St. 150.

purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious. First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust. Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders, would be to make them members of an association in which they never consented to become such. It would change the relative influence, control, and profit of each member. If the directors alone could do it, they could always perpetuate their own power. Their agency does not extend to such an act, unless so expressed in the charter, or subsequent enabling act; and such subsequent act would not bind the stockholders without their acceptance of it, or assent to it in some form.”<sup>1</sup>

In an Arkansas case,<sup>2</sup> the president, directors, *and a majority of*

<sup>1</sup> *Railway Co. v. Allerton*, 18 Wall. (U. S.) 233; *Black v. Del. & Rar. Can. Co.*, 22 N. J. Eq. 133. But in an Ohio case it was held that the power of accepting an amendment of the charter does rest in the directors. *Dayton & Cin. R. R. Co. v. Hatch*, 1 Dis. (Ohio) 84. The amendment there was to allow subscription in real estate to be received by the company. The court say: “Upon examining the charter of the plaintiffs, there would be some difficulty in determining by what power, and in what mode, the amendment could be accepted, if not by the directors of the company. That both the special charter of the plaintiff and the general railroad law contemplated that all corporate acts, including an assent to such an amendment as the one authorized, should be done by the board of directors, appears to me to be clear. The legislature has in some cases, in respect to some matters, authorized action on the part of stockholders, and directed their assent to be obtained. Such provisions will be found in the general railroad law, and they are on

points vitally affecting the interests of the stockholders. These provisions appear to show, strongly, that without them such changes might be made, under authority of the legislature, by the directors alone. It is admitted in all the authorities that the acceptance of an amendment to its charter is a power incident to a corporation; and if, from the organization of the company, there be no other active or governing body but its board of directors, then, I conceive, with that board must rest the right to exercise the powers of the corporation, and, among them, the power to accept an amendment of its charter.” See also case of *St. Mary's Church*, 6 S. & R. (Penn.) 498; 7 id. 517; *Commonwealth v. Cullen*, 13 Penn. St. 133; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Matter of Excelsior Ins. Co.*, 16 Abb. Pr. (N. Y.) 8; *Ill. River R. R. Co. v. Zimmer*, 20 Ill. 654; *Joy v. Jackson, &c.* P. R. Co., 11 Mich. 155; *Hope Mut. Fire Ins. Co. v. Beckman*, 47 Mo. 93.

<sup>2</sup> *Witter v. Mississippi, &c. R. R. Co.*, 20 Ark. 463.

*the stockholders* accepted an amendment to the charter, and the court held that it was not obligatory upon the minority. But the court held that if it had been accepted by stockholders *representing a majority of all the stock* it would be obligatory. In a Pennsylvania case it was held that in those corporate bodies where the whole body of stockholders, or other persons in interest, compose the corporation, the right of assenting to any proposed change in the charter resides in them, though they are ordinarily represented by a board of directors charged with the exercise of the corporate powers. These, in their capacity of managers, have no authority either to call for or assent to a change of the corporate constitution, but by the agreement of a majority of the corporators. Hence their assent to an amendment of the charter cannot be deemed to amount to an acceptance on the part of the corporation.<sup>1</sup>

In an Illinois case, it was said that the will of the majority of a corporation should govern in the adoption of an amendment to their charter of incorporation, unless there is fraud, or the original purpose of the corporation be entirely changed by the amendment.<sup>2</sup> And in another case in that State an amendment of the charter of a plank-road company authorizing it to mortgage its road to secure its bonds, was held to be such an amendment as may be accepted by a majority of the stockholders.<sup>3</sup> But where the power of acceptance is by the charter or general law vested in the corporation, or where the legislature has reserved the right to amend, or the amendment is immaterial and does not amount to a fundamental change which impairs the rights of the stockholders, the directors may undoubtedly accept the amendment.<sup>4</sup>

It is said that a director, as such, has no implied power to sell the bonds of the company, even if the president of the company gave him a power of attorney to do so. The power of the president to confer such authority must be shown.<sup>5</sup> But innocent purchasers of bonds from him would be protected, as he having been entrusted with them, and having apparent authority to sell them, the company

<sup>1</sup> Commonwealth v. Cullen, 13 Penn. St. 133.

<sup>2</sup> Sprague v. Illinois River R. R. Co., 19 Ill. 174.

<sup>3</sup> Joy v. Jackson, &c. P. R. Co., 11 Mich. 155.

<sup>4</sup> New Haven, &c. R. R. Co. v. Chapman, 38 Conn. 56; Clearwater v. Meredith, 1 Wall. (U. S.) 25; Bailey v. Hollis-

ter, 26 N. Y. 112; Delaware, &c. R. R. Co. v. Irick, 23 N. J. L. 321; Pacific R. R. Co. v. Renshaw, 18 Mo. 210; Pacific R. R. Co. v. Hughes, 22 id. 291; Everhart v. West Chester, &c. R. R. Co. 28 Penn. St. 239; Bedford R. R. Co. v. Bowser, 48 id. 29.

<sup>5</sup> Titus v. Cairo, &c. R. R. Co., 37 N. J. L. 98.



would be estopped from denying the title;<sup>1</sup> but an executory contract to deliver bonds in the future, would not bind the corporation, as it would be without authority, real or apparent, and such contracts may always be repudiated by the company.<sup>2</sup>

Directors, acting within the scope of their official authority, bind the corporation, but not themselves individually. Any action of theirs *in excess* of these limits is only personally binding.<sup>3</sup> In an English case, the managing director of a company, empowered to make contracts on its behalf and for its benefit, personally covenanted with P., by sealed instrument, to pay him a certain sum of money on receipt of certain assignments. No mention of the company was made in the deed, but the directors took part in the negotiations, and P. knew that the contract was made on behalf and for the benefit of the company. The company paid money to P. on account of the contract, and was afterwards ordered to be wound up. It was held that the assignments having been made to the director as trustee, upon his individual covenants, the assignee could have no equity against the company, who occupied the position of *cestui que trust*, and that P. could not claim against the company under the contract.<sup>4</sup>

So in another case, the directors of a financial company had, under the articles of association, power to buy shares in the com-

<sup>1</sup> In such a case an innocent purchaser has a right to presume authority. *Totterdell v. Fareham Blue Brick, &c. Co.*, L. R. 1 C. P. 674.

<sup>2</sup> *Pittsburgh, &c. R. R. Co. v. Allegheny Co.*, 79 Penn. St. 210; *Penn., &c. R. R. Co. v. Webb*, 9 Ohio, 136; *Kenosha, &c. R. R. Co. v. Marsh*, 17 Wis. 13; *Del., &c. R. R. Co. v. Thorp*, 1 Houst. (Del.) 149; *Rice v. Rock Island, &c. R. R. Co.*, 21 Ill. 93; *Ill., &c. R. R. Co. v. Zimmer*, 20 id. 654; *Greenville, &c. R. R. Co. v. Coleman*, 5 Rich. (S. C.) L. 118; *Ill., &c. R. R. Co. v. Beers*, 27 Ill. 185; *Wilson v. Wells Valley R. R. Co.* 33 Ga. 466; *Sparrow v. Evansville, &c. R. R. Co.*, 7 Ind. 369; *Champion v. Memphis, &c. R. R. Co.*, 35 Miss. 692; *Hawkins v. Mississippi, &c. R. R. Co.*, 35 id. 688; *New Orleans, &c. R. R. Co. v. Hani*, 27 id. 517; *Eppes v. Mississippi, &c. R. R. Co.*, 35 Ala. 33; *Martin v. Pensacola, &c. R. R. Co.*, 8 Fla. 370; *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 336;

*Buffalo, &c. R. R. Co. v. Pottle*, 23 Barb. (N. Y.) 21; *Hamilton, &c. Plank Road Co. v. Rice*, 7 id. 157; *Troy, &c. R. R. Co. v. Kerr*, 17 id., 581; *Poughkeepsie, &c. Plank Road Co. v. Griffin*, 21 id. 454; *Schenectady, &c. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573. An amendment to a charter granting additional privileges, and even extending the liabilities of the company, has been held not to be a material change. *Clark v. Monongahela Nav. Co.*, 10 Watts (Penn.), 364; *Gray v. Monongahela Nav. Co.*, 2 W. & S. (Penn.) 156. It must be a change which impairs some vested right of the stockholder, or as imposes upon him additional burdens. *Hartford, &c. R. R. Co. v. Crosswell*, 5 Hill (N. Y.), 383.

<sup>3</sup> *Smith v. Poor*, 3 Ware (U. S. C. C.), 148.

<sup>4</sup> *Re International Contract Co.*, L. R. 6 Ch. App. 525.

pany, and to do so appointed a manager. A shareholder agreed with the manager for the sale to the company of his shares, and executed a transfer thereof to two directors who were trustees for the company. The transfer was not executed by the two directors, but was registered. It was held: 1. That the directors had no authority and had not delegated to the manager the power, to buy shares, nor had they ratified the transaction with the shareholder; 2. That the directors should not be presumed to have such knowledge of the books of the company as to be affected with knowledge of the transaction; and 3. That the transfer was invalid, and the shareholder was still a contributory.<sup>1</sup> So where the directors of a company were empowered by the articles of association "to buy, sell, or loan on all descriptions of shares, including shares issued by the company (not being speculative transactions for the rise and fall of shares)," and also "to invest in such securities or investments as the board might think proper," and while the company was being formed, certain shares in it were purchased on behalf of the company at a premium, — the checks for payment of which were signed by two of the directors and sanctioned, after payment, at a meeting of the board, and some of the directors present stated that they were not aware of the nature of the transaction till afterward, — upon a bill being filed by the official liquidator to make the directors liable for the amount, it was held that the purchase of the shares was unauthorized by the articles of association, and that all the directors who were present when the checks were sanctioned, or who signed the checks, were jointly and severally liable.<sup>2</sup>

But where A. entered into an agreement to act as foreman of the "company's" works, which was signed by B. and C., two of the persons signing the memorandum of association, as "chairman" and "managing director," respectively, — in an action by A. against the company for work done under the agreement, it was held that in the absence of evidence to the contrary, the jury were justified in presuming that B. and C. had authority to bind the company.<sup>3</sup>

SEC. 154. *Delegation of Power.* — *The maxim delegatus non potest delegare, applies to directors of corporations as to all matters which require the exercise of judicial or personal discretion as a board;*<sup>4</sup> but

<sup>1</sup> *Re County Palatine Loan & Discount Co.*; L. R. 9 Ch. App. 691.

<sup>2</sup> *Land Credit Co. of Ireland v. Lord Fermoy*, L. R. 8 Eq. 7.

<sup>3</sup> *Totterdell v. Fareham Blue Brick, &c. Co.*, L. R. 1 C. P. 674.

<sup>4</sup> *Gillis v. Bailey*, 21 N. H. 149; *Mutual Ins. Co. v. Crane*, 56 N. H. 341; *Sil-*

as to all ministerial duties they may act through agents appointed for that purpose.<sup>1</sup> The question as to what powers involve the exercise of such discretion that the maxim applies thereto, is one which, in the absence of any express provision in the charter, depends almost entirely upon the nature and character of the business of the corporation, and the necessity for the employment of other agents.<sup>2</sup> The evident intention of the legislature in this regard can be arrived at in no other way; consequently, decisions involving questions of this character in reference to corporations whose business is limited, or confined within a narrow field and requiring but few agents for its prosecution, would be of but little service in solving such questions relative to railroad corporations, the main portion of whose business must from necessity be done by agents, who represent and act for the corporation, although deriving their authority from the directors. The charter of a railroad corporation, although it does not contain any express provision in reference to the delegation of their authority by directors to make contracts for the corporation relating to its business, nevertheless *must be treated as impliedly conferring such authority*; because in the very nature of things it would be both impracticable and impossible for the directors, as a board, to attend to the multifarious details of the business, and make all the contracts for the furnishing of supplies, the hiring of employees, the carriage of freight, etc., and the employment of agents for those purposes, is a matter of strict necessity; and it is to be presumed that the charter was granted by the legislature with the full knowledge of this necessity, and the full understanding that these agencies not only would, but necessarily must be employed. So too, the *usages* of the business must be considered in the interpretation of the powers of the directors in this respect; as it is presumed that the legislature was satisfied that these usages should control, else an express provision to the contrary would have been inserted in the charter. The operation of a long line of railroad without superintendents, master mechanics, master of transportation, station agents, and other heads of

ver Hook Road v. Greene, 12 R. I. 164. See *In re* Leeds Banking Co., L. R. 1 Ch. App. 561, where it was held that the power of allotting or distributing unsubscribed shares of the company, could not delegate the power, it being vested in them by the deed of settlement. See also Percy v. Millaudon, 3 La. 568, where it was held that where by the charter of a

bank the power of discounting notes and bills was vested in the *board* of directors, they could not delegate it.

<sup>1</sup> Hoyt v. Thompson, 19 N. Y. 207; Stevens v. Hill, 29 Me. 133; Spear v. Ladd, 11 Mass. 94; Northampton Bank v. Pepson, —.

<sup>2</sup> Harris' Case, L. R. 7 Ch. 587.

departments endowed with full authority to act for the corporation and to bind it by contracts relative to matters coming under their particular division of service, would be a task too herculean for any board of directors to undertake; and neither the courts nor the legislature have ever questioned the right of the directors to delegate the power to such agents to act for the corporation as to these matters, although it may frequently happen that questions involving large discretion must be acted upon by them, and there is nothing in the charter giving to the directors this power.

*The directors act as a board*, and not individually, unless specially authorized by the board, and then *they act as special agents, with special powers, rather than as directors*. But the officers elected or appointed by them, as well as the various agents appointed by them, have authority to bind the corporation as to all matters coming within the sphere of their real or apparent authority, as fully as the directors themselves could bind it.<sup>1</sup> But there are powers which the directors cannot delegate, such as we have already referred to, and the statement in the case last cited, that they may delegate to agents of their own appointment the power to perform *any acts which they can themselves perform*, is clearly erroneous in the broad sense in which the statement is made, and was doubtless intended by the court to be limited to such duties and powers as could be performed or exercised *otherwise than by the action of the board itself*. If the statement of the court in that case were to be accepted literally, then boards of this character might well be dispensed with, or if elected, might at once evade all the duties and responsibilities of their position, by appointing agents to act in their stead; and as to matters which the statute and the stockholders have expressly submitted to their judgment as a board, they might substitute the judgment of a person of their own selection, and thus frustrate not only the purposes of the statute, but also of the stockholders, who are presumed to have elected the members of the board because of their confidence in their personal qualifications for the position. Upon the other hand, while, as applied to the peculiar facts of the case, the actual doctrine of the New Hampshire case<sup>2</sup> may be correct, yet it is evident that its statement that the directors have no authority to delegate any of their powers which involve the exercise of judgment and discretion, is equally erroneous, and contrary not only to the usages of these corporations, but also to the authorities. As we have already attempted to show,

<sup>1</sup> Hoyt v. Thompson, 19 N. Y. 207.

<sup>2</sup> Gillis v. Bailey, 21 N. H. 149.

from necessity, *agencies involving the power to make contracts* must exist in carrying on the business of operating a railroad, and the making of contracts necessarily involves the exercise of very large discretion. Every station agent upon the line of the road is necessarily invested with authority to make contracts binding upon the corporation, for the transportation of freight over the road,<sup>1</sup> and in reference to any other matter that comes within the scope of his duties as such, but not otherwise. Limitations upon their power the public are not bound to take notice of;<sup>2</sup> and the same rule applies in every department of service, and the question as to whether the corporation is bound thereby, will depend upon the circumstance whether it has clothed the agent with real or apparent authority to make the contract. In the case of insurance companies, the delegation of discretionary powers is largely exercised, — as in every case where a risk is taken and a policy is issued by an agent, a very important discretion is involved; and yet, the power of these companies to delegate this authority has never been questioned. Without stopping to pursue this matter further, we think that the proposition is self-evident, that the powers which directors cannot delegate are such as involve the exercise of judicial discretion, and such as the legislature evidently intended should be possessed and exercised by them alone, as a board. Among these are the power to declare dividends, make calls,<sup>3</sup> lease the franchises and property of the company,<sup>4</sup> authorize the issue of a mortgage upon the property and franchises of the corporation,<sup>5</sup> consolidate with other railroad corporations, — where these powers are not reserved to the stockholders, — and other, kindred, powers which directly affect the well-being or

<sup>1</sup> *Wilson v. York, &c. Ry. Co.* 18 Eng. L. & Eq. 557; *Rooke v. Midland Ry. Co.*, 16 Jur. 1069. The question as to whether he has authority to enter into a contract to furnish cars at his station at a particular time, for a shipper, is one of fact. *Ward v. Chicago, &c. R. R. Co.*, 59 Iowa, 169.

<sup>2</sup> *Pruitt v. Hannibal, &c. R. R. Co.*, 62 Mo. 527.

<sup>3</sup> *Rutland, &c. R. R. Co. v. Thrall*, 35 Vt. 536; *Farmers', &c. Fire Ins. Co. v. Chase*, 56 N. H. 341; *Silver Hook Road v. Greene*, 12 R. I. 164; *Monmouth, &c. F. Ins. Co. v. Lowell*, 59 Me. 504; *Pike v. Bangor, &c. R. R. Co.*, 68 Me. 445.

<sup>4</sup> *Gillis v. Bailey*, 21 N. H. 149.

<sup>5</sup> *Hadder v. Kentucky, &c. R. R. Co.*, 7 Fed. Rep. (U. S.) 793; *Pacific Rolling Mills Co. v. Dayton, &c. R. R. Co.*, 7 Sawyer (U. S. C. C.), 61. In Massachusetts, so far as banks are concerned, it has been held that the board of directors have authority to delegate to a committee of its own number authority to alienate or mortgage real estate. *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163. But it will be observed that neither the franchise nor business of the corporation was to be affected by the conveyances. In the latter case, a very different question would be presented, and would doubtless be decided in a different manner.

existence of the corporation. Mr. BRICE, in his excellent treatise,<sup>1</sup> lays down what I believe to be the true rule, as follows: "This restriction extends only to those acts which the directors are personally required to attend to, or which, involving personal judgment and discretion, they are by implication intrusted personally with, and so have with respect thereto a duty thrown upon them. What these latter acts are will often be very doubtful."

SEC. 155. **How Directors should act.** — As to acts which can only be done by the directors, they should be done by vote at a regular meeting of the board;<sup>2</sup> but in ordinary matters they may give their assent to the act separately, especially where such has been the usage;<sup>3</sup> and it is held that such assent may be implied from their acquiescence in the course of business. Thus, in a Massachusetts case,<sup>4</sup> the superintendent of the defendant company bought glass to keep up their stock while their works were being repaired. All the directors of the company but one knew of the purchase at the time, and he knew of it soon after, and no action repudiating the purchase was ever taken. In an action to recover the price of the glass, it was held that the acts of the superintendent were authorized by the company.<sup>5</sup> But in order to make an act a *corporate act*, they should act upon it as directors, and not in some other capacity, and in order to give validity to an act which may be done by separate consent, the consent of at least a quorum of the board must be obtained.<sup>6</sup> The rule in reference to these matters, may be said to be that where a matter is of public concern, of an executive or ministerial character, the act of the majority of the board will suffice, although the others are not consulted. But where the function is judicial, involving a determination of some definite question, the whole body must be assembled and act together;<sup>7</sup> and in cases coming under the latter clause of the

<sup>1</sup> Green's Brice's *Ultra Vires*, 491.

<sup>2</sup> Pittsburgh, &c. R. R. Co. v. Clarke, 29 Penn. St. 146; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205; Edgerly v. Emerson, 23 N. H. 555; Johnston v. Jones, 23 N. J. Eq. 216; Junction R. R. Co. v. Reeve, 15 Ind. 236.

<sup>3</sup> Bee v. San Francisco, &c. R. R. Co., 46 Cal. 248; Foot v. Rutland & Washington R. R. Co., 36 Vt. 633; Bank of Middlebury v. Rutland & Washington R. R. Co., 30 id. 159. In Rogers v. Hastings, &c. R. R. Co., 22 Minn. 25, it was held that a director who rendered special services as attorney and land commis-

sioner at the request of the other directors might recover therefor.

<sup>4</sup> Lyndeborough Glass Co. v. Mass. Glass Co., 111 Mass. 315.

<sup>5</sup> Sherman v. Fitch, 98 Mass. 59; Pittsburgh, &c. R. R. Co. v. Clarke, 29 Penn. St. 146.

<sup>6</sup> Junction R. R. Co. v. Reeve, 15 Ind. 236; Cram v. Bangor House, &c., 12 Me. 354.

<sup>7</sup> King v. Great Marlow, 2 East, 244; Battye v. Gresley, 8 East, 319; King v. Winwick, 8 T. R. 454; Green v. Miller, 6 Johns. (N. Y.) 38; Yellow Jacket Mining Co. v. Stevenson, 5 Nev. 224.

rule, a majority of the members cannot in any case bind the corporation; and this includes acts affecting the ownership of the real estate and property essential to the existence of the corporation and the prosecution of its business.<sup>1</sup>

In this respect railway directors certainly come under the former head of the rule, as their duties are of a *quasi* public character. If the matter is of public concern, the decision of a majority will bind; but in private concerns, as arbitrations, all must concur.<sup>2</sup> In an English case, where a quorum consisted of three directors, and the secretary had affixed the seal of the corporation to a bond after obtaining the written authority of only two of them at a private interview, and at another private interview the verbal promise of another to sign the authority, the court held that there should be at least a combined action.<sup>3</sup> And in New Hampshire, it was held that where the by-laws of a private corporation confer upon the directors power to act in behalf of the corporation, without special limitation as to the manner, a majority may act within the scope of the authority given the board, and bind the corporation, either where there is a consultation of all together, and a concurrence of a majority, or where there is a regular meeting at which all might be present, and a majority actually meet and act by a majority vote; that the act of a majority does not bind the corporation unless there is an assent of all the directors at a meeting, or, *perhaps*, separately obtained; or there was a meeting and consultation of the whole board and a vote of the majority; or a meeting held at some regular period, at which a majority were present and acted by a majority vote; or a meeting regularly notified, at which a majority assembled and acted by a majority vote. But doubts are expressed as to the validity of acts secured by the assent of directors separately obtained.<sup>4</sup>

<sup>1</sup> *Ross v. Crockett*, 14 La. An. 811.

<sup>2</sup> *Despatch Line, &c. v. Bellamy Mfg. Co.*, 12 N. H. 205, where a doubt is expressed on this subject. See also *Edgerly v. Emerson*, 23 id. 555; *Cammeyer v. German Churches*, 2 Sandf. Ch. (N. Y.) 186; *Corn Exchange Bank v. Cumberland Coal Co.*, 1 Bosw. (N. Y.) 436; *Dey v. Jersey City*, 19 N. J. Eq. 412; *Schumm v. Seymour*, 24 N. J. Eq. 153; *Stoytown, &c. Turnpike Co. v. Craver*, 45 Penn. St. 386; *Ross v. Crockett*, 14 La. An. 811; *Yellow Jacket Mining Co. v. Stevenson*, 5 Nev. 224. But see *Tenney v. East War-*

*ren Lumber Co.*, 43 N. H. 343, where it was held that it is sufficient proof, for a stranger, of the concurrence of the board, to show that they assented separately.

<sup>3</sup> *D'Arcy v. Tamar, &c. R. R. Co.*, L. R. 2 Ex. 158. But see *Re Bonellis Tel. Co.*, *Collie's Claim*, L. R. 12 Eq. 246, 260. See also *Glover v. Northwestern R. R. Co.*, 5 Ex. 66. All acts of the board should be by resolutions of the board while sitting as such in consultation. *Ross v. Crockett*, 14 La. An. 811.

<sup>4</sup> *Despatch Line, &c. v. Bellamy Mfg.*

In Vermont it is held that they may act separately, or that for some purposes at least they may act otherwise than at a board meeting. In a case involving that question, the court say: "The directors, in the absence of restrictions in the charter or by-laws, have all the authority of the corporation itself in the conduct of its ordinary business. And it is not important that this authority be conferred at an assembly of the directors, unless that is the usual mode of their doing such acts. If they adopt the practice of giving a separate assent to the execution of contracts by their agents, it is of the same force as if done at a regular meeting of the board. If this were not so, it would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks, and similar corporations in this country, is without any formal meetings or votes of the board. Hence there follows a necessity of giving effect to the acts of such corporations according to the mode in which they choose to allow them to be transacted."<sup>1</sup>

They may appoint a committee of their board to discharge certain duties, as to audit the accounts of their financial officers, to arrange the terms of a lease, mortgage, etc.; but in all these instances, the acts of the committee must be acted upon by the board before they are binding upon the corporation.<sup>2</sup> If the by-laws or statute points out the mode in which the directors shall act, this mode should be pursued, although it seems that a mode of action prescribed by a by-law may be modified by usage;<sup>3</sup> but where the mode is prescribed by statute, such mode must be pursued, and cannot be varied by usage;<sup>4</sup> but the want of this formality cannot be set up by, but

Co., 12 N. H. 205; *Edgerly v. Emerson*, 23 N. H. 555.

<sup>1</sup> *Bank of Middlebury v. Rutland, &c. R. R. Co.*, 30 Vt. 159. In a subsequent case, where this doctrine was followed, the court say: "The question of law is simply this, whether in all cases a contract for services to the bank, concluded by two directors professing to act for the bank, and subsequently approved by a third, is unauthorized for want of a formal vote or conference with the other two members of the board. It is very true that there might be contracts of such a kind that the action of the board by formal vote would be essential to their validity. But, on the other hand, it is not necessary that the whole board should be consulted, or a

vote taken upon every trifling detail of business. If a particular line of procedure has been resolved upon or is necessarily incident to the business of the bank, it is not essential that every expenditure of money, or engagement of service, or other item within the line so marked out, should receive the consideration of all the directors outside a meeting, or that a meeting of them should act upon it." *Bradstreet v. Bank of Royalton*, 42 Vt. 128.

<sup>2</sup> *Waite v. Windham Co. Mining Co.*, 36 Vt. 18.

<sup>3</sup> *Pittsburgh, &c. R. R. Co. v. Clarke, ante.*

<sup>4</sup> *Pittsburgh, &c. R. R. Co. v. Clarke, ante.*



may be against, a person who is bound to see to its observance;<sup>1</sup> and the question as to who is bound to know whether or not a necessary formality has been observed, depends first upon the question whether the charter of the company is a public act, and second, whether he stood in such a relation to the company that he knew or was bound to know that the formality was necessary, and therefore was bound to ascertain whether or not it had been observed.<sup>2</sup> A distinction also exists between formalities which are mandatory and those which are merely directory. A neglect to comply therewith in the former case would render the act nugatory,<sup>3</sup> while in the latter case, the act

<sup>1</sup> Newcastle Marine Ins. Co., *ex parte*, 19 Beav. 97; Taylor v. Hughes, 2 J. & Lat. 24; Bargate v. Shortridge, 5 H. L. Cas. 297; *In re* Native Iron Ore Co., 2 Ch. Div. 345; Galveston R. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459; Samuel v. Holliday, 1 Woolw. (U. S. C. C.) 400.

<sup>2</sup> *In re* European Railway Co., L. R. 8 Eq. 444; Bush's Case, L. R. 6 H. L. 37; Walker's Case, L. R. 2 Eq. 554; Marino's Case, L. R. 2 Ch. 596; Head's Case, L. R. 3 Eq. 84; Union Mining Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640; Mott v. United States Trust Co., 19 Barb. (N. Y.) 569; Jackson Ins. Co. v. Cross, 9 Heisk. (Tenn.) 283; Allen v. Freedman's Trust Co., 14 Fla. 418; Littlewort v. Davis, 50 Miss. 403. In Galveston R. R. Co. v. Cowdrey, *ante*, a railroad company was held to be estopped from repudiating a mortgage given to secure bonds that were held by *bond fide* holders upon the ground its directors authorized its execution outside the State; and in Samuel v. Holliday, *ante*, it was held that where the by-laws of a corporation were prescribed by the directors, and there was irregularity in the action of the directors, in disregarding the by-laws relative to notice of a special meeting, the corporation could not set up such irregularity to impair the validity of the acts of the directors, against third persons, and that if at a meeting of the board an act is done, or ordered to be done, and no objection is made as to its regularity at that or any subsequent time, by any director or stockholder, and the act authorized is afterwards performed, its legality cannot afterwards be questioned

in a suit in equity upon the ground of its irregularity.

<sup>3</sup> Formalities are imperative where they are expressly declared to be so in the statute. Homersham v. Wolverhampton Water Works, 6 Exchq. 137; Leominster Canal Co. v. Shrewsbury, &c. Railway Co., 3 K. & J. 654. Where they involve the destruction of rights, as the forfeiture of stock, etc. Garden, &c. Mining Co. v. McLister, 1 App. 39. Or where they are imposed in mandatory terms in the statute, and their performance is made a condition precedent to the right to do the act, — as in cases where municipal corporations are authorized to raise money to aid in the construction of railroads, etc., if the taxpayers so vote; or where the corporation is authorized to lease, mortgage, or sell its property if the stockholders so vote. These formalities are indispensable to the validity of the acts, and all persons at their peril are bound to know whether they have been observed or not. Steines v. Franklin Co., 48 Mo. 167; Concord v. Portsmouth Savings Bank, 92 U. S. 625; Eagle v. Cohn, 84 Ill. 292; Leavenworth R. R. Co. v. County Court, 42 Mo. 171. But if the material formalities have been observed, a failure to comply with those which are not material, will not, at least as to innocent parties, invalidate the acts; because they are treated as being directory rather than mandatory, and as leaving some discretion with the officers of the corporation as to their exercise, and also because the maxim *de minimis non curat lex* applies, and an attempt to enforce a rigid rule in the insignificant affairs of daily life would be unjust as well as to-

would be binding in favor of all persons dealing with the corporation who did not have notice actual or constructive of the required formality.<sup>1</sup> Where the act is one within the scope of the director's powers, every person dealing with the corporation has a right, in the absence of anything suggesting inquiry, to presume that they have complied with the necessary formalities and proceeded regularly in the execution of the power;<sup>2</sup> and if a valid claim is not thereby created at law, it will be enforced in equity. Thus, in an English case,<sup>3</sup> a claim was made against the Athenæum Life Assurance Company on account of the agreement of the directors to issue a policy. PAGE WOOD, V. C., said: "There is no doubt an important distinction to be drawn . . . between that which *on the face of it* is manifestly imperfect, when tested by the requirement of the deed of settlement of the company, and that which contains nothing to indicate that those requirements have not been complied with. Thus, where the deed requires certain instruments to be made under the common seal of the company, every person contracting with the company can see at once whether that requisition is complied with, *and he is bound to do so*; but where, as in the case I have last referred to, the conditions required by the deed consist of certain internal arrangements of the company, — for instance, resolutions of meetings and the like, — if the party contracting with the directors *finds the acts to be within the scope of their power under the deed, he has a right to assume that all such conditions have been complied with*. In the case last supposed, he is not bound to inquire whether the resolutions have been duly passed or the like; otherwise he would be bound to go further back, and to inquire whether the meetings have been duly

tally impracticable. *Mott v. United States Ins. Co.*, 19 Barb. (N. Y.) 569; *Coloma v. Eaves*, 92 U. S. 484; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Grand Chester v. Winegar*, 15 Wall. (U. S.) 353; *Pendleton v. Aray*, 13 Wall. (U. S.) 297; *Marion Co. v. Clark*, 94 U. S. 278; *Lane v. Schamp*, 20 N. J. Eq. 82; *Rock Creek v. Strong*, 96 U. S. 271; *Woodhull v. Beaver Co.*, 3 Wall. Jr. (U. S.) 274; *Wood v. Allegheny Co.*, 3 id. 267; *Judson v. Plattsburgh*, 3 Dill. (U. S. C. C.) 181; *Venice v. Murdock*, 92 U. S. 494.

<sup>1</sup> *Royal British Bank v. Turquand*, 6 E. & B. 327; *Bissell v. Michigan, &c. R. R. Co.*, 22 N. Y. 258. In *Prince of Wales Life Assur. Co. v. Harding*, 1 E. B.

& E. 183, the deed of settlement made provision that the seal of the company should not be put upon any policy unless an order signed by three directors, and countersigned by the manager, was issued to that effect; and it was held that the provision was merely directory, and that a policy issued under seal without such order, was not void, the assured being ignorant of the informality. See also *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. (U. S.) 381; *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64.

<sup>2</sup> *Mutual Life Ins. Co. v. Cleveland, &c. R. R. Co.*, 41 Barb. (N. Y.) 8.

<sup>3</sup> *Ex parte Eagle Co.*, 4 K. & J. 549.

summoned, and so ascertain a variety of other matters, into which, if it were necessary to make such inquiry, it would be impossible for the company to carry on the business for which it is formed.”<sup>1</sup>

<sup>1</sup> It is evident that the directors of a corporation, in whatever manner constituted, are the agents of the corporation, and, within the scope of the authority conferred by the laws or regulations of the company relating to them, their acts are the acts of the company. The general principles of the law of agency are applicable to the relations between the company and its directors. But they are agents only so far as they have authority by virtue of powers conferred; and of this authority and the extent or limit of it, parties dealing with these or other agents of the corporation would be required to take notice. These are open to public inspection, and constitute the power of attorney, and instructions to these agents, accessible to all parties dealing with them. *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. (U. S.) 381; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 587; *Pearce v. M. & I. R. R. Co.*, 21 How. (U. S.) 441. The familiar doctrine in such cases is, that although the party dealing with an agent is not required to take notice of private instructions communicated to him from the principal in reference to his agency, he is required to take notice of a written authority and power of attorney, which he should know, from the circumstances of the case or the character of the agency, must exist. And where there is a special authority to do a particular act, or a general authority to do all acts relating to a particular matter, the agent may use all the necessary and appropriate means to carry out the purposes of the agency; and any person dealing with such an agent may rely upon the acts of such an agent, in executing the authority thus conferred, as obligatory upon his principal. All persons dealing with the agents of a corporation must be supposed to know the provisions of the fundamental laws of the corporation, and the limitations therein contained relating to the authority of its agents, as these laws are usually accessible to all persons. But where agents act within the apparent scope of the authority con-

ferred upon them, it will be presumed that their acts were authorized by the body they represent. *Bissell v. Michigan Southern, &c. R. R. Co.*, 22 N. Y. 258. In this case, SELDEN, J., observes: “There is, in England, a class of corporations organized under general laws, which do not provide the manner in which the objects and purposes of the corporation are to be effected, but leave this to be arranged by a deed of settlement between the corporators themselves. By this deed the companies prescribe and limit the powers and functions of their various officers, so far as they are left uncontrolled by the statute and the general laws of the kingdom. Now, it is plain that there is no analogy between an act which merely transcends the limits of this deed of settlement, and one which violates the provisions of this organic act. The deed of settlement is the private act of the shareholders, and its provisions have respect solely to their private interests. It is a mere power of attorney, and bears no resemblance to a law enacted with a view to the interests of the public. There is evidently no question of public policy involved, when the question is, whether the officers have exceeded their authority.” It has, however, been held that the doctrine that authority to make a contract, by an agent acting for an individual, will be implied from former employment of the same agent for the same purposes, has no application where the person assumes to act as agent for a corporation. *Wyman v. Hallowell Bank*, 14 Mass. 58. The reason of this distinction is, that in the first case the extent of the authority is generally known only between the principal and agent, but in the latter the authority is created by statute, or is a matter of record, to which all may have access who have occasion to deal with its officers. *Salem Bank v. Gloucester Bank*, 17 Mass. 1. See also *State v. Commercial Bank of Manchester*, 14 Miss. 237. In Massachusetts a distinction has been made between the provisions of the charter in relation to the authority of directors and

The claim was allowed, the Vice Chancellor grounding his decision on the fact that though the deed of settlement required every policy,

other officers which parties are bound to know, and of by-laws, of which actual notice, it is claimed, should be brought home to the parties dealing with the agents. *Fay v. Noble*, 12 Cush. (Mass.) 1. This doctrine is based upon the distinction, that in the one case the means of knowledge is open and public, while in the other it is private. This would, however, we apprehend, be limited to those cases where the by-laws were adopted by the board of directors. But in this country organizations are generally formed under general statutes, by signing articles or certificates of association, etc., and these may provide for, and prescribe the duties of, officers and agents, and thereby such regulations would become a part of its organic law. In some cases, however, the general doctrine seems to have been maintained, that parties dealing with an agent would be bound even to take notice of the limitations of his authority contained in the by-laws, as being matters of record, and subject to examination by those dealing with the corporation. *Adrianse v. Roome*, 52 Barb. (N. Y.) 399; *Wild v. Bank of Passamaquoddy*, 3 Mas. (U. S.) 505; *State v. Commercial Bank*, 14 Miss.; *Risley v. Indiana, &c. R. R. Co.*, 1 Hun (N. Y.), 202; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262; *Mechanics' Bank v. New York, &c. R. R. Co.*, 13 N. Y. 599; *McCulloch v. Moss*, 5 Den. (N. Y.) 567; *Dabney v. Stevens*, 40 How. Pr. (N. Y.) 341; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Lowell Savings Bank v. Winchester*, 8 Allen (Mass.), 109. But an examination of the cases will disclose the fact that this duty is imposed upon third persons, or as they may be called, strangers to the corporation, only when the act is one not naturally incident to the powers of directors, or one not usually executed by them, or when an act was done by some officer of the corporation, which is usually incident to the duties of the directors. In such cases the party is fairly put upon inquiry as to whether the act is authorized, and fails to make proper inquiry at his peril. This rule was well illustrated in a New York case, — *Risley v. Indianapolis, &c.*

*R. R. Co.*, 1 Hun (N. Y.), 202, — in which the plaintiff sought to recover \$50,000 of the defendant corporation for alleged services for obtaining for and introducing to the Danville, &c. R. R. Co. contractors who would undertake to build its road, and for the conversion of certain municipal bonds, alleged to have been agreed to be delivered by said company in payment for said services. The defendant corporation was formed in 1869, under the general laws of Indiana and Illinois, by the consolidation of the Indianapolis, Crawfordsville, & Danville R. R. Co., and the Danville, Urbank, Bloomington & Pekin R. R. Co. By the consolidation the defendant corporation assumed all the liabilities of the constituent roads. The president of the Indiana and a director of the Illinois corporation conducted the negotiation with the plaintiff and the president of the Illinois corporation, and by authority of the latter offered the plaintiff the sum named above for the services. The defendants resisted the suit upon the ground that the president had no authority to make the contract in question. There was no evidence from which it could be inferred that the company, whose officer he was, had ever held him out or permitted him to represent himself as having authority of that kind, and the court in reversing the judgment below for the plaintiff, by DANIELS, J., said: "The president with whom the contract for the payment to the plaintiff was made had no special or direct authority from the company to enter into any agreement of that kind. . . . The circumstance that he was president of the company was not of itself evidence of the existence of such authority, for it does not ordinarily appertain to the duties of persons acting in that capacity. He was at most the agent of the company created and existing under a special legislative act defining the rights and privileges of the body, and the manner in which they should be enjoyed. This the plaintiff is to be regarded as knowing. For all persons dealing with the officers or agents of a corporation are bound to know that they act under either its charter or

etc., to be under the hands of not less than three of the directors, and sealed with the common seal of the society, yet "*in every other con-*

by-laws, or the usages which may be shown to exist, defining the extent of their authority. They must, in doubtful cases, acquaint themselves with the extent of that authority, or otherwise submit to the consequences resulting from their omission to do that. *North River Bank v. Aymer*, 3 Hill (N. Y.), 262; *Mechanics' Bank v. New York & N. H. R. R. Co.*, 13 N. Y. 599, 631, 634; *McCulloch v. Moss*, 5 Den. (N. Y.) 567; *Adrianse v. Roome*, 52 Barb. (N. Y.) 399; *Dabney v. Stevens*, 40 How. Pr. (N. Y.) 341, 345, 346. The charter of the company gave the immediate government and direction of its affairs to a board of thirteen directors, having power to elect one of their number president, a majority of whom constituted a quorum for the transaction of business. But it conferred no authority on the person who should be elected president to bind the company by his contracts. His power in that respect appears to have been defined exclusively by the by-laws enacted by the company. And it was restricted to the management of all negotiations with other corporations, companies or individuals, touching their mutual interests and the claims of either party on the other, and to entering into or concluding all such agreements or contracts, with any of such parties as should be approved by the board of the executive committee. This entirely withheld the power to make contracts binding on the company, unless the approval of the executive committee was first obtained for that purpose. And it deprived him of the power of entering into the agreement which the referee, upon sufficient evidence, has found was made by him with the plaintiff for the payment of the \$50,000. The case of the *MERCHANTS' Bank v. State Bank*, 10 Wall. (U. S.) 604, was relied upon as sustaining the validity of all contracts entered into by officers of corporations. But it clearly could not have been intended by that decision to sanction so broad an extension of the law affecting transactions of this description. Very broad propositions, it must be confessed, were stated in the opinion, but perhaps none too much so for

the facts and evidence in the case which the court then decided. The one chiefly relied upon to sustain the contract in this case states the law to be, '*that where a party deals with a corporation in good faith, the transaction not being ultra vires, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.*' But even this does not extend as far as the purposes of the plaintiff's case require, in order to sustain his recovery; for the president of the company was not invested with a defective or irregular authority to bind the company by his contracts; he had no authority whatever for that purpose. And where that is the case, and the officer has not been permitted to act as though he had the authority, there is nothing in that decision holding that he can bind the company. But this proposition is inapplicable to the present case, because there was a circumstance brought to the plaintiff's knowledge, according to his own evidence, which ought to have excited his suspicions that the president had no power to bind the company by the agreement; for he says that Griggs, the president, and Wilson, one of the directors acting with him, had not brought with them proper evidence of their authority to contract for the building of this and the other road, and it was decided that the execution should be adjourned over for them to go home, convene their board of directors, and get them to do whatever was necessary to be done about the contract for building the roads. If they could not, for want of power, enter into contracts for the construction of the road, which was a substantial part of what the corporation was created to do, it is difficult to see how it could, with any propriety, be assumed that the power existed, without any action of the board, which would authorize the president to make the contract with the plaintiff upon which he has been allowed to recover. The fact that the president

*tract* " it was sufficient if there should be " a reference to these presents, and a proviso limiting," etc., which had actually been inserted in the instrument upon which the claim was based. He said : " In the case before me I find in the deed of this society a section distinguishing between certain *completed* instruments, which it requires to be under the common seal of the society, and other contracts, which, like the former, are to be satisfied out of the funds of the society, but as to which there is no such requisition with reference to the manner in which they are to be executed. I find in another section a power given to the directors, wherever the deed is silent, to do everything which is necessary for carrying on the business of the company ; and I then find a contract, executed by three of the directors, which is a reasonable contract and within the precise scope and object of the society, — namely, a contract to issue a policy in the very form which the society was constituted for the purpose of issuing. Under these circumstances it appears to me that the contract in question is one into which the directors were authorized to enter, and which, upon bill filed, the society would have been decreed to perform. I therefore hold that the debt is established, if not at law, as a good equitable debt."

Formalities except those which are imperative may be waived, and informal transactions may be acquiesced in so as to bind the corporation ;<sup>1</sup> and at least some *imperative* formalities may, by having been so long and so universally disregarded, cease to be operative, — as, where a corporation has conducted a certain branch of its business in such a way for such a length of time as to establish a usage different from that provided in the by-laws, there seems to be no question that it will be bound by acts so done, *where the informality is not of such a kind as to render the act absolutely void.*<sup>2</sup> Thus,

could not, without specific authority, bind the company by one agreement should have been accepted as quite conclusive evidence of some want of authority to render the other obligatory upon it. One was a fair inference from the other."

<sup>1</sup> *Zabriskie v. Cleveland, &c. R. R. Co., ante* ; *Walton's Case*, 26 L. J. Ch. 545 ; *Bargate v. Shortridge*, 5 H. L. Cas. 297.

<sup>2</sup> *Walton's Case, ante*. In *Bargate v. Shortridge*, 5 H. L. Cas. 297, the deed of settlement of a banking company, allowed shareholders to dispose of their shares upon obtaining " the consent of the board

of directors," which was to be testified by " a certificate in writing, signed by three of the directors." During the whole time that the bank carried on business, a managing director received the applications for sales of shares, consented, and signed the certificate of " consent," which was afterwards signed by two other directors, but was never signed by the three assembled as a board. *Shortridge*, a shareholder, had at various times, with such consents, sold his shares. The directors, under 7 Geo. IV., c. 46, made a return to that effect. The company failed, and the

where the statute provides that a transfer of stock shall be made in a certain way, if the company by a systematic course of business

directors passed a resolution that there had been no valid transfer of the shares of Shortridge. It was held, however, that as between him and the company, the consents given by the directors, although informal and irregular, were valid, and that they could not afterwards treat Shortridge as a member of the company. This case goes farther than this, for it was a creditor of the company who was attempting to secure his debt by process against a shareholder, and the decision that, as the company itself was estopped by its acquiescence, so also its creditors claiming through it were barred by the same acquiescence, seems to be both sound and just. As illustrating the principles, both as to acquiescence and as to the necessity for officials to see to formalities which concern their own acts, see *Murray v. Bush*, L. R. 6 H. L. 37. This case illustrates the difficulty of applying the law to circumstances such as were there involved. The original decision was reversed by the Lord Chancellor, and though the reversal was upheld, it was only by the fact that the law lords were equally divided. A company being in difficulties, and disputes having arisen, it was determined to admit new directors. Bush, one of the existing directors, agreed to transfer his shares to an incoming director, and in pursuance of such agreement, a deed of transfer was executed by both; but the transferee did not execute a deed of covenant as required by the deed of settlement. The Master of the Rolls, on the winding up of the company, held Bush to be still liable upon the shares, and placed his name on the list of contributories. "It is true that there are many cases in which the undue neglect of forms by directors has not invalidated a *bond fide* transfer of shares; but, so far as I have observed, this has always been in cases between strangers, who had not the power to compel the directors to observe the proper forms, or in cases where they were ignorant of, and had no means of ascertaining, the informality which had been committed. But the case is very different when, as here, the transfer is by a director himself, whose object is to retire from

the company, and who has the power to see that everything is done according to due regularity, and still more different when the transfer is made to another person acting as director of the company; and it is something more than form when the director who makes the transfer does not follow the form prescribed by the act of Parliament in that very case, and when, by reason of the omission so to do, the transferee becomes in no respect bound by the deed of settlement, the execution of which was, by the rules of the society, prescribed as a preliminary condition to his becoming a member of the company." This judgment of Lord ROMILLY contains a very clear statement of the law on the point. From it, as an exposition of law, the Lord Chancellor did not dissent, but he, nevertheless, discharged the order of the Master of the Rolls, upon the grounds: partly, of lapse of time, and of the acquiescence of the shareholders in the transaction; partly, that it was the duty solely of the remaining directors to see to the execution of the deed of covenant by the transferee. Upon this latter point he said: "It is quite true that Mr. Bush was a director when he dealt with the shares, but when he parted with his shares he was no longer a director or shareholder, and he had no control over the matter beyond having the right to file a bill. The persons who were to see that within a month the deed was executed, were the directors of the company, and the duty of seeing the deed executed was thrown upon them, and not upon Mr. Bush." But really the questions to be settled in this and similar cases, were and are, first, whether a director proposing to retire from a company, is or is not bound to see to the performance of the proper formalities, and has or has not thrown upon him the duty of doing all that he can do to secure their due observance; secondly, which was a special point here, whether when there is a transfer to another official, it is not a part of that official's contract to see to the formalities; and thirdly, whether failing these, he ceases to be a shareholder. A corporation may incur a liability different from

has allowed transfers to be made in a different way, there is no doubt but that transfers so made would be upheld,<sup>1</sup> at least in equity. But the rule would be otherwise where the formality is one which is required by the express terms of the charter or general law.<sup>2</sup> Unless the statute expressly provides what number shall constitute a quorum, a *majority* of the whole board must act;<sup>3</sup> and if any of the directors have a direct pecuniary interest in the act to be done, there must be a majority exclusive of their votes.<sup>4</sup> The by-laws may provide what number shall constitute a quorum although less than a majority.<sup>5</sup> As a rule, all should be notified, but it is held that where the statute provides that a certain number shall constitute a quorum, and neither the statute nor by-laws provide for notice to all, notice to the rest is not essential to the validity of the action of the requisite number.<sup>6</sup> And in all cases where the requisite quorum was present, it will be presumed that notice was given as required by statute or the by-laws.<sup>7</sup> But this presumption is only *prima facie*, and may be rebutted by proof that notice was not in fact given.<sup>8</sup>

the prescriptions of its charter. Like individuals, it is responsible for the manner in which it permits its agents to hold it out to the world. The corporation should disavow the practice, or the usages of their agents in the transaction of business shall be presumed to have their sanction. An authority to contract in a particular mode, may be proved by a vote of the stockholders; and in prevention of fraud and prosecution of justice, it may be presumed. It may be implied from their acquiescence in the usual mode of transacting the business of the corporation, and expressing no objection against it. *Buckley v. Derby Fishery Co.*, 2 Conn. 252; *Witte v. same*, id. 260; see *Stafford v. Wyckoff*, 4 Hill (N. Y.), 442. *Green's Brice's Ultra Vires*, 256-258.

<sup>1</sup> *In re Vale of Neath, &c. Co.*, 3 De G. & S. 149.

<sup>2</sup> *Pittsburgh, &c. R. R. Co. v. Clarke*, 29 Penn. St. 146.

<sup>3</sup> *Willcock's case*, 7 Cow. (N. Y.) 402; *People v. Twaddle*, 18 Hun (N. Y.), 427; *Buel v. Buckingham*, 16 Iowa, 284; *Field v. Field*, 9 Wend. (N. Y.) 394; *Junction R. R. Co. v. Reeve*, 15 Ind. 236; *Lockwood v. Mechanics' National Bank*, 9 R. I. 308; *Cram v. Bangor House*, 12

Me. 354; *Sargent v. Webster*, 13 Met. (Mass.) 497; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124 *Craig v. First Presbyterian Church*, 88 Penn. St. 42; *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402; *Price v. Grand Rapids R. R. Co.*, 13 Ind. 58; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205.

<sup>4</sup> *Ernest v. Nicholls*, 6 H. L. Cas. 401; *Butts v. Wood*, 37 N. Y. 317.

<sup>5</sup> *Hoyt v. Thompson*, 19 N. Y. 207.

<sup>6</sup> *State v. Smith*, 48 Vt. 266; *Edgerly v. Emerson*, 23 N. H. 555.

<sup>7</sup> *Mahaska Co. R. R. Co. v. Des Moines Valley R. R. Co.*, 28 Iowa, 437; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

<sup>8</sup> In *Chouteau Ins. Co. v. Holmes*, 68 Mo. 601, 30 Am. Rep. 807, assessments were made at special meetings of the directors, at which a quorum was present, but there was no evidence to show that notice of these meetings was given to the directors, and upon that ground it was claimed that the assessments were not legally made. HENRY, J., in an opinion in which he carefully reviews the cases, said: "It does not appear by express evidence that notices of the special meetings of the board of directors, at which the assess-



There is a distinction between directory and imperative formalities. Directory formalities are those which are for the benefit of

ments were made, were given to the directors, although it does appear that a quorum of the directors was present and made the assessments. Nor was any evidence introduced or offered to show that notices were not given. That all the directors must be notified of a special meeting of the board is conceded; but the question for determination is, whether if the meeting be held and a quorum be present, it will be presumed, in the absence of evidence to the contrary, that such notice was given, and all steps taken necessary to constitute it a regular and valid meeting of the board. In *Sargent v. Webster*, 13 Met. (Mass.) 504; *Lane v. Brainerd*, 30 Conn. 577, and *McDaniels v. The Flower Brook Mfg. Co.*, 22 Vt. 274, it was decided that such would be the presumption. In *Sargent v. Webster* the court observed: 'Another objection of the same kind is, that it does not appear that notice of the meeting was given to all the directors. But the contrary does not appear; and it would be hazardous to decide that every vote passed by an aggregate body is void, if it do not appear by the record that all were present. We believe it is not usual, in corporate records, to state how the members were notified. The presumption, "*omnia rite acta*," covers multitudes of defects in such cases, and throws the burden of proof upon those who would deny the regularity of a meeting, for want of due notice to establish it by proof.' The doctrine thus declared was as distinctly announced in the other cases above cited, and also in *State ex rel. Bornefeld v. Kupferle*, 44 Mo. 155. For a contrary doctrine appellant relies upon the *State v. Ferguson*, 31 N. J. L. 124; *Stow v. Wyse*, 7 Conn. 215; *Wiggin v. The Free Will Baptist Church*, 8 Met. (Mass.) 301; *People v. Batchelor*, 22 N. Y. 128; *Atlantic Mut. Ins. Co. v. Fitzpatrick*, 2 Gray (Mass.), 279; and *People's Ins. Co. v. Westcott*, 14 id. 440, — in all of which it affirmatively appears either that no notice or an insufficient notice had been given of the directors' or corporation meeting, the proceedings of which were complained of. In *State*

*v. Ferguson* the court said: 'The fifth man was not present, nor was he notified of the meeting.' It appeared that the fifth township committeeman had not been notified of the meeting, and of course the presumption of the existence of a fact which it was proved did not exist, could not be indulged. So in the *Atlantic Delaine Co. v. Mason*, 5 R. I. 463, it affirmatively appeared that Hill, Carpenter & Co. had no notice of a meeting of stockholders at which an assessment on stock had been made. In *Stow v. Wyse*, 7 Conn. 214, parol evidence was admitted to prove that persons named in the vote at a meeting which authorized the execution of a deed for a company, convened and passed that vote without any notice to the other members of the company. In *Wiggin v. The Free Will Baptist Church*, 8 Met. (Mass.) 301, there was evidence of notice, but the notice given was held insufficient. In *People v. Batchelor*, 22 N. Y. 128, the court based its opinion upon the fact, which was shown by evidence, that the absent alderman had no notice of the meeting of the board. The case of *Atlantic Mut. Fire Ins. Co. v. Fitzpatrick*, 2 Gray (Mass.), 279, does seem to militate against the cases cited in 13 Met., (Mass.) 301, and 22 Vt.; but there is a very meagre statement of the facts, and the opinion on this point is brief and cites no authorities. The case in 13 Met. is not mentioned, although two of the four judges then on the bench were members of the court when the case in 13 Met. was decided. It certainly was not intended to overrule that case, and it is difficult to determine from the report of the case in 2 Gray, what precise question was before the court. *People's Ins. Co. v. Westcott*, 14 Gray (Mass.), 440, does not support a different doctrine from that held in 13 Met. It turned on the validity of a by-law passed at a special meeting of the company held in pursuance of a notice duly published, 'for the purpose of making alterations in the by-laws, and for the transaction of such business as may come before them.' At the meeting thus held, the by-laws

the corporation and may be waived by it, or which it may compel the directors to observe, if they persistently neglect to do so. But imperative formalities are those which are essential to the validity of the act to which they are incident. If merely directory formalities are not observed by the directors, their acts will be binding upon the corporation as to persons who have no notice of the formality required.<sup>1</sup> In all cases where agents are acting within the scope of apparent powers, it is presumed that they have complied with all requisite formalities, and a person who does not *know* that they have not done so, will not be deprived of his rights because they did not in fact comply with such formalities, when the power to do the act is not affected by the formality in question.<sup>2</sup> Imperative formalities are rather in the nature of conditions precedent than of formalities. That is, the power to do an act is made dependent upon their observance; consequently, if they are not observed the act would be without authority, and not obligatory upon the corporation.

A single director has no power by virtue of his office to act for, or bind the corporation, except in so far as the power has been delegated to him by the board. It is the *board of directors* only which can act, and if they constitute a director or any other person

were altered by making four directors a quorum instead of five, and seven additional directors were chosen. Four of the seven thus chosen were the only directors who were present at the directors' meeting by which the assessment was made. The court, HOAR, J., said: 'But a decisive objection to the choice of these new directors is, that in the call for the meeting at which they were chosen there was no intimation of any purpose to make such election.' Expressing a doubt as to the right of the company to elect directors, except at their annual meetings, he added: 'No vote to increase the number of directors had been passed at any meeting held for such a purpose.' It will be observed that there was a notice, but the court held the notice insufficient and the election void. We think that the weight of authority on this question is to the effect that *notice of a special meeting of the directors of a corporation will be presumed, in the absence of evidence showing that no notice was given.* The instructions of the court are open to criticism, but the only

one containing a serious error is that given for defendant, as follows: 'That there is no evidence in this case to show that either of said meetings was called by the president, or that notice of either of them was, in any way, given to all the members of the board of directors.' If we have correctly stated the law, competent proof of the meeting of a quorum of the board is *prima facie* evidence that it was called by the president, if such a call were necessary, and that notice of the meeting was given to all the directors. No error materially affecting the merits of the controversy was committed by the court, and the only serious error was on the side of appellant in the instruction given for him, of which he cannot complain."

<sup>1</sup> *Bissell v. Michigan Southern, &c. R. R. Co.*, 22 N. Y. 258; *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64; *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. (U. S.) 381.

<sup>2</sup> *Bissell v. Michigan, &c. R. R. Co.*, *ante*.

their agent, with certain powers, then, as to such powers such director can act in such matters as the board itself could. As to such matters he then acts for and in place of the board and with equal authority; and as to such matters notice to, or knowledge acquired by him, is notice to, or the knowledge of the board and corporation.<sup>1</sup> A corporation, like an individual or firm, is bound by the admissions and representations of its directors and other agents, made while in the line of their duty, and acting within the scope of their authority.<sup>2</sup> But the admission or representation must be that of

<sup>1</sup> *Hoover v. Wise*, 91 U. S. 308; *Fulton Bank v. Canal Co.*, 4 Paige Ch. (N. Y.) 127; *National North River Bank v. Aymer*, 3 Hill (N. Y.), 263; *Fairfield Savings Bank v. Child*, 72 Me. 226; 39 Am. Rep. 319.

<sup>2</sup> *Burnes v. Pennell*, 2 H. L. 497; *Menx's Case*, 2 DeG. M. & G. 522. The declarations or acts of a director in a corporation will not bind, or in any manner affect, the corporation, unless they are within the scope of his ordinary powers, or some special agency relative to the subject matter. *Soper v. Buffalo & Rochester R. R. Co.*, 19 Barb. (N. Y.) 310. Nor are the declarations of individuals, who are directors of a bank, *not forming a part of an official act*, admissible to prove an antecedent fact against the bank. *Pemigewasset Bank v. Rogers*, 18 N. H. 255. Neither stockholders nor directors, without special power, can create a corporate liability; therefore the confessions, admissions, or knowledge of either, while not engaged in the precise business confided to them, cannot affect the corporation. *Loomis v. Eagle Bank of Rochester*, 1 Dis. (Ohio) 285. In publishing false and fraudulent representations with regard to the affairs of the company, or in doing any other act not within the scope of their authority as limited by the deed of settlement, they cannot be considered as the agents of the company, so as to bind the company. Therefore, if directors, in the course of the performance of their duty, make false or fraudulent representations addressed to shareholders, and afterwards give them an authorized circulation beyond the limits of the company, a stranger acting upon such representations, and suffering loss in consequence, has no remedy against the

company, unless he can show that the whole company were a party to the fraud. *Re Royal British Bank*, 5 Jur. N. S. 205. Thus, a company was formed for mining purposes. The prospectus referred to the memorandum and articles of association, and described in favorable terms a mine for the purchase of which a contract had been entered into. This mine was afterwards found to be worthless, and the directors rescinded the contract, and agreed to purchase another. It was held, that a shareholder who had subscribed on the faith of the prospectus was entitled to an injunction against an action for this, although the directors had themselves been deceived, and had been guilty of no wilful fraud. Directors are bound to ascertain the truth of the representations made on their prospectus. *Smith v. Reese River Co.*, 2 L. R. Eq. Cas. 264. A corporation entered into an agreement with certain railroad contractors, that, if the latter would contract to build a certain railroad in which the corporation were interested, upon the basis of a stock subscription, and subscribe for a specified amount of stock, the former would convey as many shares of their stock as should be agreed upon by the president and the contractors, subject to the approval of the directors. The contract was subsequently completed; the stock subscribed for; the shares of the corporation transferred by the president, whose action the directors approved; and the resolution of the directors was approved by the stockholders. It was held, that, even if the road was never built, and the stock never paid for, and admitting that the corporation were entitled in equity to a return of their stock, neither the fairness nor validity of the issue of the stock, nor

the directors or a quorum thereof as a body, or if by only one of the directors, some other proof of authority than the mere circumstance that he was a director must be given.<sup>1</sup> If the director personally

the legality of the election of directors chosen by votes cast upon the stock thus issued, was thereby impaired. *Savage v. Ball*, 17 N. J. Eq. 142. Where a corporation sued one who had contracted to build a bridge and furnish all materials, for a breach of the contract, it was held that the fact that the work was unfinished because the corporation had not provided certain materials which the president, a director, told the contractor that the corporation should furnish, was not available; on the ground, among others, that the directors had no authority to give a construction to the written agreement. *Hartford Bridge Co. v. Granger*, 4 Conn. 142. A railway company which was not in a position to raise money under the borrowing powers in their special act, requiring money, the chairman and one of the directors raised it on their joint and several promissory notes, and the money was applied for the purpose of the company. Subsequently the director paid the notes, and brought his action against the chairman, when the board, "to discharge the liability of the chairman," authorized the secretary to seal "Lloyd's bonds" to the amount of the liability. It was held, in an action brought by the chairman upon one of these bonds, that it was illegal, and that the plaintiff could not recover. *Chambers v. Manchester & Milford Ry. Co.*, 33 Law J. N. S. 268. A director is not authorized, as such, without special authority, to make notes binding the corporation. *Lawrence v. Gebhard*, 41 Barb. (N. Y.) 575. Nor can the directors of a mining association bind the members by accepting a bill, unless they are authorized to do so by the deed or instrument of co-partnership, by the necessity of such a power to the carrying on of the business, by the usage of similar establishments, or by express assent of the party sought to be charged. Still less can they bind the members by a bill drawn upon the directors by their own servant, such a bill being in effect a promissory note. *Dickinson v. Valpy*, 10 B. & C. 128.

<sup>1</sup> *Thew v. Porcelain Mfg. Co.*, 5 S. C. 415; *Soper v. Buffalo, &c. R. R. Co.*, 19 Barb. (N. Y.) 310; *Huntington, &c. R. R. Co., v. Decker*, 82 Penn. St. 119; *Penn. R. R. Co.'s Appeal*, 80 id. 265. In *Harvey v. West Side Elevated R. R. Co.*, 18 Hun (N. Y.), 392, an action was brought to recover the amount due upon an account stated. The plaintiff, while vice-president of the corporation defendant, asked Mr. Taylor, who was the book-keeper of the corporation, and who also performed the duties of secretary and assistant treasurer thereof, for a copy of his account on the books of the corporation. Thereupon Mr. Taylor gave him a transcript of his account on the ledger. This action is founded solely upon that transcript, which the plaintiff claims is an account stated. The referee sustained such claim and rendered judgment for the plaintiff for the amount which appeared by said transcript to be due him, with interest. The court, at General Term, said: "We think the referee erred. No evidence was given which shows that Mr. Taylor was authorized to render an account to the plaintiff, which should be conclusive on the defendant. Without such authority an account rendered by him would not become binding on the corporation by the acquiescence of the plaintiff. Even if such an authority might be implied from the general duties of a treasurer or assistant treasurer, when such officer had rendered an account to a debtor of the corporation, it by no means follows that actual authority need not be shown when the legal effect of the act would be to liquidate or establish unsettled demands against the corporation. An officer who does not possess the power to create a debt against the corporation directly, cannot do it indirectly by sending an account which shows a balance due to the person to whom it is sent. In this case, however, Mr. Taylor did not assume to exercise such a power. He sent no account to be acquiesced in or rejected by the plaintiff. His attention was not called to the question whether the account was

has any interest in the contract, the contract will be void at the election of the *cestui que trust*.<sup>1</sup> The *prima facie* or apparent powers of directors are entirely different from the *prima facie* powers of their agents, because all are bound to know that they act as a board and not individually, and that they have no authority to act individually unless authorized to do so by the board, or unless their action is subsequently ratified by the board, expressly or impliedly; whereas the ordinary agents of the corporation are presumed to have authority commensurate with the duties with which they are entrusted. Thus, the general manager of a railroad company directed an assistant to have certain work about the railroad done, and in pursuance thereof the assistant made a contract with a third party to do the work. A memorandum of the contract was made which simply recited that such third person would do the work, without mentioning for whom, for a certain sum, under the direction of the engineer of the company; and this memorandum was signed by the third person, and by the assistant, without any designation of his office, or the capacity in which, or the party for whom, he made such contract, but also without any express assumption of personal liability. It was held that it was the contract of the company.<sup>2</sup> So station agents are presumed to have power to make contracts

full or accurate or not. In short, he merely complied with the plaintiff's request without any intention of binding the corporation. An essential element of an account stated, therefore, is wanting, namely, that it was rendered for the purpose of asserting a claim, or at least of establishing the balance due thereby. Upon these grounds, namely, (1) that no authority in Mr. Taylor to bind the corporation by means of an account stated was shown; and (2) that Mr. Taylor did not intend or assume to exercise such a power." The judgment was reversed. *Farrell Foundry Co. v. Dart*, 26 Conn. 376; *Westfield Bank v. Conner*, 37 N. Y. 320; *Smith v. North Carolina R. R. Co.*, 68 N. C. 107; *Charleston, &c. R. R. Co. v. Blake*, 12 Rich. (S. C.) L. 634; *Bank of Grafton v. Woodward*, 5 N. H. 301; *Law v. Conn. & Pass. River R. R. Co.*, 45 N. H. 370; 46 id. 284; *Cocheco Bank v. Haskell*, 51 id. 116; *Muhleman v. Nat. Ins. Co.*, 6 W. Va. 508; *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151; *Chelmsford Co. v. Demorest*, 7 Gray

(Mass.), 1; *Toll Bridge Co. v. Bettsworth*, 30 Conn. 380; *Matteson v. N. Y. Central R. R. Co.*, 67 Barb. (N. Y.) 364; *East River Bank v. Hoyt*, 41 id. 441; *Crump v. United States Mining Co.*, 7 Gratt. (Va.) 352; *Union Mining Co. v. Rocky Mt. National Bank*, 1 Col. 531; 2 id. 248; *Green v. Ophir Mining Co.*, 45 Cal. 522; *Kennedy v. Otoe Nat. Bank*, 7 Neb. 59; *Am. Express Co. v. Gilbert*, 57 Ill. 468; *Kalamazoo Mfg. Co. v. McAllister*, 32 Wis. 34; *Vicksburgh R. R. Co. v. Ragsdale*, 54 Miss. 200; *Mitchell v. Rome R. R. Co.*, 17 Ga. 574; *Chicago, Burlington, &c. R. R. Co. v. Coleman*, 18 Ill. 297; *Michigan, &c. R. R. Co. v. Granger*, 55 id. 503; *Toledo, &c. R. R. Co. v. Fisher*, 13 Ind. 258; *Howe Sewing Machine Co. v. Snow*, 32 Iowa, 433; *Hillar v. Crawford*, 37 Ind. 279; *Jones v. Planters' Bank*, 9 Heisk. (Tenn.) 455.  
<sup>1</sup> *Gilman, &c. R. R. Co. v. Kelly*, 77 Ill. 426.

<sup>2</sup> *Missouri, K. & T. R. R. Co. v. Brown*, 14 Kan. 557.

for their railroads for the transportation of freight. The limitations on their powers the public cannot take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them.<sup>1</sup>

In a suit brought to recover for loss of freight against the defendants, as trustees of certain mortgages to secure the payment of bonds issued by a railroad company, it was held that to show that the defendants acted as such trustees, and had the control and management of the road as such was sufficient; it was not necessary to show that they were actually trustees.<sup>2</sup> So where the plaintiff was employed by the vice-president of the defendant railroad corporation, to operate an electric light used for the purpose of illuminating the defendant's advertisements, and for examining baggage at night, and the fact that he was so engaged in the defendant's service was notorious, and it also appeared that bills for services rendered by other persons had been paid on vouchers certified by the vice-president, it was held that these facts were sufficient to warrant a jury in finding that the vice-president had authority to employ the plaintiff for the company.<sup>3</sup>

The reason for this distinction is that in the one case it is to be presumed that a majority of the board must assent to the act, while in the latter case, as the agent appears to have authority, it is to be presumed that he has it, to the extent necessary for the discharge of his duties.

It is not necessary that the acts and resolutions of the board should be recorded, but if they are, the record is the best evidence of their action, and parol evidence would not be received to establish the facts shown by it;<sup>4</sup> but the *bona fides* of their acts may be inquired into, and for this purpose parol proof as to what they did may be given.<sup>5</sup> So if the records are lost,<sup>6</sup> or there is an omission in the records, they may be supplied by parol;<sup>7</sup> and so too, a fraudulent entry may be impeached by the same class of proof.<sup>8</sup>

**SEC. 156. Where they may meet.**—A meeting of a board of directors may be held outside the limits of the State in which the

<sup>1</sup> *Pruitt v. Hannibal & St. J. R. R. Co.*, 62 Mo. 527.

<sup>2</sup> *Pearson v. Wheeler*, 55 N. H. 41.

<sup>3</sup> *Shimmel v. Erie Railway Co.*, 5 Daly (N. Y.), 396.

<sup>4</sup> *Langsdale v. Bouton*, 12 Ind. 467; *Cram v. Bangor House, &c.*, 12 Me. 354; *Edgerley v. Emerson*, 23 N. H. 355.

<sup>5</sup> *Waite v. Windham Co. Mining Co.*, ante.

<sup>6</sup> *Dix v. Akers*, 30 Ind. 431.

<sup>7</sup> *Taymouth v. Koehler*, 35 Mich. 22; *Ratcliff v. Teters*, 27 Ohio St. 66.

<sup>8</sup> *Thorne v. Travellers' Ins. Co.*, 80 Penn St. 15.

corporation has its domicile, unless the charter or general law expressly prohibits it from so doing. They are not a corporate body, and when acting as a board, they are but a board of officers or agents, and they may exercise their powers as agents beyond the bounds where the corporation exists. Thus, where a charter, granted by the State of Illinois, created a corporation and appointed a board of directors, it was held that the directors had power to meet and act in the State of Missouri.<sup>1</sup> The act of the directors of a corporation, by which an authority is conferred upon an agent to execute a deed, is not a corporate act; the directors act in such a case, not as the corporation, but as the agents of and in behalf of the corporation. And it is no objection to the validity of the vote of the directors that it was passed at a meeting of the board held out of the State where the corporation was created and exists.<sup>2</sup> Acting merely as agents of the corporation, there is no reason why they may not act as a board in another State, or even in another country, as well as in the State in and by which the corporation was created.<sup>3</sup>

**SEC. 157. Notice of Meetings: Quorum.**—Where the directors have stated meetings either by virtue of the charter, by-laws, or resolution of the board, — as, on the first Monday of each month, etc., — no notice of such meetings is required, as they are all bound to take notice of the time and place of the holding thereof.<sup>4</sup> But as to all other, or special meetings, or one to be held at a different place, each member of the board must be notified thereof in the mode provided by the charter or by-laws, or if no provision is made therefor, then personally, or in the usual mode.<sup>5</sup> Upon this head, the rules already given as to corporate meetings apply.<sup>6</sup>

**SEC. 158. Compensation of.**—The law does not imply a promise on the part of a corporation to pay directors, and in order to entitle them thereto there must be provision made therefor, either in the by-laws or by a resolution of the board, or by some contract which fixes the liability of the company to pay. In other words, they must look either to a statute or a contract for compensation for their

<sup>1</sup> *Ohio & Mississippi R. R. Co. v. McPherson*, 35 Mo. 13.

<sup>2</sup> *Arms v. Conant*, 36 Vt. 744; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 387; *Smith v. Alvord*, 63 Barb. (N. Y.) 415; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 476.

<sup>3</sup> *Bank of Augusta v. Earle*, *ante*.

<sup>4</sup> *Warner v. Mower*, 11 Vt. 385.

<sup>5</sup> *Smyth v. Darley*, 2 H. L. Cas. 789; *In re British Sugar Refg. Co.*, 3 K. & J. 408.

<sup>6</sup> See *ante*, § 134.

services;<sup>1</sup> and even a resolution of the board, passed *after* the services are rendered, gives no right of action against the company therefor;<sup>2</sup> and where the compensation is fixed by statute, they cannot be allowed extra compensation *for services as directors* by a resolution of the board;<sup>3</sup> but an individual member of the board may receive compensation for services rendered *before* he became a director, under a resolution of the board;<sup>4</sup> or, if the compensation is fixed

<sup>1</sup> *American, &c. R. R. Co. v. Miles*, 52 Ill. 174; *Cheney v. Lafayette, &c. R. R. Co.*, 68 id. 570; *Pierson v. Thompson*, 1 Edw. Ch. (N. Y.) 212; *Hall v. Vt. & Mass. R. R. Co.*, 28 Vt. 401; *Hodges v. Rutland, &c. R. R. Co.*, 29 Vt. 220; *Henry v. Rutland, &c. R. R. Co.*, 27 Vt. 435; *Bailey v. Buffalo, &c. R. R. Co.*, 14 Hun (N. Y.), 483; *Chandler v. Monmouth Bank*, 18 N. J. Eq. 255; *Jackson v. N. Y. Central R. R. Co.*, 2 T. & C. (N. Y.) 653; *Butts v. Wood*, 37 N. Y. 317; *Maux Ferry Gravel Road Co. v. Branegan*, 40 Ind. 361; *Gridley v. Lafayette, &c. R. R. Co.*, 71 Ill. 200; *Illinois Linen Co. v. Hough*, 91 id. 63; *Lafayette, Bloomington, &c. R. R. Co. v. Cheney*, 87 Ill. 446. If under a proper employment a director performs a duty as an officer, and which are usually performed by other agencies, and which are not required of him by the charter or by-laws of the company, such as procuring right of way and soliciting subscriptions, he will be entitled to compensation for such services. *Holder v. Lafayette, Bloomington, & Mississippi R. R. Co.*, 71 Ill. 106. But he cannot recover for services performed as a member of the executive committee, nor in making efforts to contract for the construction of the road, including time and travel, as these are a part of his duties as director. *Cheney v. Lafayette, Bloomington, & Mississippi R. R. Co.*, 68 Ill. 570. Where a director of a railway company is appointed treasurer, and no provision at the time is made for his compensation, he will have no right to claim pay for the same, and the subsequent allowance of a claim in his favor will not entitle him to recover. *Holder v. Lafayette, Bloomington, & Mississippi R. R. Co.*, 71 Ill. 106. And the same was also held when a director was appointed and served as secretary of the com-

pany. *Rogers v. Hastings, &c. R. R. Co.*, 22 Minn. 25. Before a director can recover for his services as such, it must appear that a by-law or a resolution had been adopted allowing such compensation. It will not be sufficient to prove that the matter of allowing compensation was talked over by the board when in session, where the records of the company fail to show any allowance. Where a by-law of a railway company provided that, whenever any bill against the company should be certified as correct by a majority of the executive committee, the president or vice-president should draw an order on the treasurer for the amount thereof, and that the secretary should countersign the same, which order should constitute a proper voucher against the company; and a bill for the services of a director was indorsed, "approved by the executive committee," and signed by only two of the committee, which consisted of five members, it was held that the bill was not properly audited in pursuance of the by-law, and afforded no evidence of an account stated. *Rockford, Rock Island & St. Louis R. R. Co. v. Sage*, 65 Ill. 328. A railway company cannot, at an ordinary general meeting, make a donation to its directors on account of past services performed by them. *Hutton v. West Cork Ry. Co.*, L. R. 23 Ch. Div. 654.

<sup>2</sup> *Loan Association v. Stonemetz*, 29 Penn. St. 534; *Dunton v. Imperial Gas Co.*, 3 B. & Ad. 125; *N. Y. & N. H. R. R. Co. v. Ketchum*, 27 Conn. 170.

<sup>3</sup> *Branch Bank at Mobile v. Collins*, 7 Ala. 95; *Branch Bank at Mobile v. Scott*, 7 id. 107.

<sup>4</sup> *Branch Bank at Mobile v. Collins, ante*; *N. Y. & N. H. R. R. Co. v. Ketchum, ante*.



by the board, it may undoubtedly be increased by a vote of the board during his term. So, too, he may recover for services rendered by him while a director, as agent of the company at its request, but not in his character as director;<sup>1</sup> and the question as to whether such services were special, so that he is entitled to pay therefor, depends upon the circumstance whether they were rendered at the request of the board, express or implied, and whether they were such as could be rendered by a person other than a director;<sup>2</sup> and in a Mississippi case<sup>3</sup> it was held that "special" services are such as are rendered outside the board meetings, but the doctrine of this case is hardly in accordance with the authorities upon this point.

The rule relating to the right of a director to compensation, except where it is provided for as stated *supra*, is so strict that it has been held that even a director who receives no compensation cannot recover a reward offered by the corporation for the recovery of money of which it has been robbed, etc.,<sup>4</sup> upon the ground that in using his efforts in this direction he was doing no more than his duty as director; but it is believed that according to the weight of authority this would be deemed a *special* service for which a recovery may be had. In the case of a president, treasurer, and other officers elected by the board, and who are also directors, they are not entitled to extra compensation therefor unless it is provided for either in the charter, by-laws, or by resolution of the board; but the rule is otherwise where such officer or agent is not a member of the board, and in the latter case, even though no compensation is voted or fixed he would be entitled to recover the reasonable value of his services upon a *quantum meruit*.<sup>5</sup> For money necessarily expended by a director in good faith for the corporation, he is entitled to be reimbursed.<sup>6</sup>

**SEC. 159. Directors' Knowledge of Facts is Knowledge of the Corporation, when.** — Notice given to a board of directors, is notice to

<sup>1</sup> Chandler v. Monmouth Bank, 13 N. J. Eq. 255; Henry v. Rutland, &c. R. R. Co., ante; Hodges v. Rutland, &c. R. R. Co., ante; Shackelford v. New Orleans, &c. R. R. Co., 37 Miss. 202; Santa Clara Mining Association v. Meredith, 49 Md. 389; Rogers v. Hastings, 22 Minn. 25.

<sup>2</sup> Henry v. Rutland, &c. R. R. Co., ante; Hodges v. Rutland, &c. R. R. Co., ante.

<sup>3</sup> Shackelford v. New Orleans, &c. R. R. Co., ante.

<sup>4</sup> Stacy v. State Bank, 5 Ill. 91.

<sup>5</sup> Holden v. Lafayette, &c. R. R. Co., 71 Ill. 106.

<sup>6</sup> Fraylor v. Sonora Mining Co., 17 Cal. 594; Rogers v. Hastings, ante; Missouri R. R. Co. v. Richards, 8 Kan. 101.

the corporation and to their successors in office,<sup>1</sup> but in order to affect a corporation with notice or knowledge of a fact, because given to, or within the knowledge of one or more of the board, it must appear that he acquired such knowledge, or received such notice while acting officially in the business of the corporation;<sup>2</sup> and knowledge of facts which comes to him privately, or by public rumor, and which he does not communicate to the board is not binding upon the corporation.<sup>3</sup> But notice to him, or knowledge acquired by him, *while*

<sup>1</sup> *In re German Mining Co.*, 4 DeG. M. & G. 19; *Gridley v. Lafayette, &c. R. R. Co.*, *ante*; *Merrick v. Peru Coal Co.*, 61 Ill. 472.

<sup>2</sup> *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige Ch. (N. Y.) 127; *Mechanics' Bank, &c. v. Seton*, 1 Pet. (U. S.) 299.

<sup>3</sup> *Farrell Foundry Co. v. Dart*, 26 Conn. 376; *La Farge Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *First National Bank v. Gifford*, 47 Iowa, 575; *Great Western R. R. Co. v. Wheeler*, 20 Mich. 419; *First National Bank v. Christopher*, 40 N. J. L. 435; *Smith v. Board of Water Commissioners*, 38 Conn. 208. In *National Bank v. Norton*, 1 Hill (N. Y.) 572, in the form of *dicta* it is said that the director to whom notice is given officially, for communication to the board, "must necessarily, perhaps, be considered as the agent of the bank, to that extent." In *Bank of United States v. Davis*, 2 Hill (N. Y.), 451, a different principle is adopted, which is followed in *North River Bank v. Aymar*, 3 Hill (N. Y.), 262, that, no matter how the knowledge is acquired by a director, *if he acts as a member of the board upon the transaction in regard to which he has notice, his knowledge is the knowledge of the board.* The court, in *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381, distinctly disapproves of these cases. *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, is also opposed to this principle. In that case one of the directors was also one of those contracting with the corporation. The court, in deciding that his knowledge of matters concerning the contract was not notice to the bank, say: "To admit the stockholders or directors of a bank to subject it to liability, or to affect its interests, *unless they have authority so to do expressly*

*by its charter*, would be attended with the most dangerous consequences, and is certainly not sanctioned by any authority." Notice to a stockholder is not notice to the corporation, but knowledge actually imparted to the board by a director or stockholder at a regular meeting, is notice to the corporation. *Bank of Pittsburgh v. Whitehead*, 10 Watts (Penn.), 397; *Custer v. Tompkins Co. Bank*, 9 Penn. St. 27. And in no case where an officer of a corporation is dealing with them in a matter in which his own interest is opposed to theirs, can he be deemed to represent them in the transaction with effect to charge them with knowledge he may possess, but has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys. *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; *Winchester v. Baltimore, &c. R. R. Co.*, 4 Md. 231; *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. L. 435; *Stevenson v. Bay City*, 26 Mich. 44; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481. In *Great Western Railway v. Wheeler*, 20 Mich. 419, it is said that as a corporation has no memory, except through its agents and its records, the knowledge of any fact by an agent of a corporation does not constitute notice of such fact to the company after the termination of the agency, where the subject of notice has no relation to any usage, system, course of business, or persistently impressive circumstance upon which a presumption can be raised, that knowledge of it once brought home to an agent must permanently attach to the corporation. Thus, knowledge of the arbitrary mark of a consignee of goods by railroad, possessed by a former officer or agent of the railroad company, such knowl-

*he is acting for the corporation and for its benefit, relating to such transaction, binds the corporation*<sup>1</sup> unless he is acting adversely to

edge not having been acquired by any usage, custom, or course of business of the company, is not the knowledge of the company. Notice of such fact should attach to the principal only so long as the knowledge remains present in the agency. Where a corporation or its stockholders sue directors for fraudulent management, the knowledge of these directors cannot be set up as the knowledge of the corporation, in order to raise the bar of the statute of limitations to the action. *Ryan v. Leavenworth, &c. R. R. Co.*, 21 Kan. 365, 404. The notice must be express, and to the agents of the company as such. *Hazard v. Durand*, 11 R. I. 195; *Smith v. Water Com'rs*, 38 Conn. 208; *Gaston v. Am. Exch. Bank*, 29 N. J. Eq. 98; *Bank of America v. McNeil*, 10 Bush (Ky.), 54; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Singer Mfg. Co. v. Holdfort*, 86 Ill. 455; *Phelps v. Maxwell's Cr. Mining Co.*, 49 Cal. 336. Where a corporation has two agents of equal power and authority, notice to one is constructive notice to the other, and therefore notice to the corporation. *Perry v. Simpson Mfg. Co.*, 37 Conn. 520. In order to affect a corporation by the knowledge of a fact on the part of one of its directors, it is necessary that he should have such knowledge while acting officially in the business of the corporation, or that he should have been acting at the time under special authority conferred upon him, other than what he possessed as one of its directors. *Farrell Foundry Co. v. Dart*, 26 Conn. 376; *Nat. Security Bank v. Cushman*, 121 Mass. 490; *Platt v. Birmingham Axle Co.*, 41 Conn. 255; *Westfield Bank v. Cornen*, 37 N. Y. 320; *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. L. 435; *Pittsburgh, &c. R. R. Co. v. Woolley*, 12 Bush (Ky.), 451; *Wells v. American Ex. Co.*, 44 Wis. 342; *First Nat. Bank of Davenport v. Gifford*, 47 Iowa, 575. Thus, knowledge of a director of a bank, as to the object for which certain bills of exchange were delivered to a party applying to the bank for their discount, such director not being present at the meeting of the directors at which such application was made and such bills dis-

counted, and not having communicated his knowledge to any other director or officer of the bank, is not to be regarded as notice to the bank. *Farmers and Citizens' Bank v. Payne*, 25 Conn. 444. Where a director of a bank, authorized on certain conditions to 'procure notes for discount, got a note under pretence of having it discounted, when the conditions were not satisfied, and the maker knew of the conditions, it was held that the director did not act officially, and that the bank, to which the note had been passed by the director in pledge for a loan to himself, was not affected with notice of the circumstances under which the note was given, but could recover on it from the maker. *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24. But where a director of a corporation bought lands from it, and united with others in forming a new company and subscribed for almost all of its stock, became one of its officers and directors, and shortly afterwards, in pursuance of an entire plan, conveyed the same lands to the new company in payment of his subscription, the new company was held to be affected with notice of the circumstances impairing his title. *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456. In *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381, the court say: "The sound and safe rule on the subject is this: that notice given to a director privately, or which he acquires from rumor, or through channels open to all alike, and which he does not communicate to his associates at the board, will not bind the institution. But if the notice is given to him officially for the purpose of being communicated, although such notice should not be so communicated, the institution is bound by it."

<sup>1</sup> *United States Ins. Co. v. Shriver, ante*; *General Ins. Co. of Md. v. United States Ins. Co. of Baltimore*, 10 Md. 517; *National Bank v. Norton*, 1 Hill (N. Y.), 572; *Bank of United States v. Davis*, 2 id. 451; *Citizens' Bank v. Payne*, 25 Conn. 444; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; *Terrell v. Branch Bank*, 12 Ala. 502.

the corporation or in fraud of it.<sup>1</sup> But a different rule prevails as to notice given to or knowledge acquired by such officers of the corporation as the president,<sup>2</sup> cashier,<sup>3</sup> secretary,<sup>4</sup> or agents,<sup>5</sup> coming within their line of duty; and as to matters about which they are acting or have authority to act for the corporation, notice or knowledge is imputable to the corporation, as it is to be presumed that they communicated it to the corporation. But neither notice to nor the knowledge of<sup>6</sup> a stockholder, although he subsequently becomes an officer,<sup>7</sup> is binding upon the corporation.

SEC. 160. **Liability of Directors to the Public for Fraud.**—By reason of the position which directors occupy to the corporation, and the means which they have of knowing its actual condition, financial and otherwise, if they make false and fraudulent<sup>8</sup> statements as to the value of the stock or the condition of the business of the corporation, *knowing them to be false*, they are liable to the parties to whom they were made, and by whom they were acted upon, for all the damage which they thereby sustain and no other privity between them is necessary.<sup>9</sup> If the fraud is committed by the way of a pro-

<sup>1</sup> *Smith v. South Royalton Bank*, 32 Vt. 341; *Bank of United States v. Davis*, *ante*; *Fulton Bank v. Benedict*, 1 Hall (N. Y.), 480; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228.

<sup>2</sup> *City Bank of New York v. Barnard*, 1 Hall (N. Y.), 70; *Hoffman, &c. Co. v. Cumberland, &c. Co.*, 16 Md. 456; *Barnes v. Trenton Gas Co.*, 27 N. J. Eq. 33; *First National Bank v. Gifford*, *ante*.

<sup>3</sup> *Porter v. Bank of Rutland*, 19 Vt. 410; *Commercial Bank v. Wood*, 7 W. & S. (Penn.) 89. Although it seems that the information or notice must be acquired or given while he was *acting* as president. *Winchester v. Baltimore, &c. R. R. Co.*, 4 Md. 231; *Miller v. Illinois Central R. R. Co.*, 24 Barb. (N. Y.) 312.

<sup>4</sup> *Trenton Banking Co. v. Woodruff*, 1 N. J. Eq. 117.

<sup>5</sup> *Goodall v. N. E. Mut. Fire Ins. Co.*, 25 N. H. 169; *Schenck v. Mercer County Mut. Ins. Co.*, 24 N. J. L. 447.

<sup>6</sup> *Black v. Camden, &c. R. R. Co.*, 45 Barb. (N. Y.) 40; *Nashville, &c. R. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611; *Danville Bridge Co. v. Pomroy*, 15 Penn. St. 151.

<sup>7</sup> *Union Canal Co. v. Lloyd*, 4 W. & S. (Penn.) 393; *Housatonic Bank v. Martin*,

1 Met. (Mass.) 294; *Bank of Pittsburgh v. Whitehead*, 10 Watts (Penn.), 393.

<sup>8</sup> *The Admiral*, 8 L. R. n. s. 91.

<sup>9</sup> *Teague v. Irwin*, 127 Mass. 217. The directors of a company who create a trust in the property of the corporation, and constitute a part of their own number trustees to consider and determine the management and sale of such property, come within the rule which forbids a trustee to administer the trust for his own benefit. Directors cannot, by creating such a trust, create a claim in their own favor to compensation for the performance of the duties of the trust. *Ogden v. Murray*, 39 N. Y. 202. In an English case, *Madrid Bank v. Polly*, L. R. 7 Eq. 442, the articles of association of a banking company with a nominal capital of £1,200,000 in 60,000 shares, of which the prospectus stated that the first issue would be 30,000, empowered the directors to commence business as soon as they should think fit, notwithstanding the whole capital might not have been subscribed for, and provided that upon the first allotment of shares £10,000 should be paid to the promoters. When only 5,000 shares had been subscribed for, and before the company was in a situation to commence busi-

spectus containing false and fraudulent statements, relative to matters peculiarly within their knowledge, issued by all or only a part

ness, the directors allotted the shares and paid £5,000 to the promoters, who immediately paid to four of the directors £500 apiece. The company having been ordered to be wound up, it was held in a suit by the official liquidator, in the name of the company against the directors, to which the promoters were not parties, that the directors could not be charged with the money paid to the promoters, but that each of the four directors must repay to the company the £500 received by him from the promoters. The promoters of a company, who were also directors, purchased land and sold it to the company at an increased price, retaining the difference for themselves. Part of the purchase-money was paid in debenture bonds. After the company had gone into liquidation, L., a director, but not one of the promoters, purchased 100 of the debentures for which he claimed to prove. It was held that L., as a director, could not plead ignorance of the purchase by which the shareholders were defrauded; that having been in the position of a trustee for the shareholders, he could not, by the purchase of the debentures after the insolvency, make a profit out of a transaction which, as such trustee, he ought to have prevented; and that the claim must be disallowed. *Re Imperial Land Co. of Marseilles*, L. R. 4 Ch. D. 566. The mere fact that one is a director and stockholder in a corporation, does not render him liable for the frauds and misrepresentations of the active managers. Some knowledge and participation in the act claimed to be fraudulent must be brought home to the person charged. It is only where a director lends his name and influence to promote a fraud, or is guilty of some violation of law or other mismanagement, that he is personally liable. *Arthur v. Griswold*, 55 N. Y. 400. In a company formed for the purchase of a business, where the power to make the purchase is distinctly conferred on the directors, though the character of the business turns out to be ruinous, unless that character was obviously apparent when the purchase was made, the directors

will not be personally responsible for making it. In such a case, malfeasance or gross negligence must be shown. *Overend & Gurney Co. v. Gibb*, L. R. 5 H. of L. 480. In a bill for the specific performance of a resolution passed by the board of directors of a railway company, the plaintiff alleged that he was entitled to have a certain number of shares allotted to him under the resolution; and prayed that if it should appear that all the shares had been allotted to other shareholders, the directors might indemnify him out of their own shares, or might be charged with damages. All the shares had been allotted before the filing of the bill. It was held that as no relief by way of specific performance was possible, the plaintiff's claim for damages failed also. In such a case the plaintiff's claim against the directors to be indemnified out of their own shares, is only a claim for damages in another form. *Ferguson v. Wilson*, L. R. 2 Ch. App. 77. The directors of a corporation organized under a general law, are chargeable with knowledge of the provisions of the law regulating their duties, or imposing liabilities upon them. *Van Etten v. Eaton*, 19 Mich. 187. Three directors of a railway company opened, on behalf of the company, an account with a bank, and sent a letter, signed by them as directors, requesting the bank to honor checks signed by two of the directors, and countersigned by the secretary. The account was largely overdrawn by means of such checks, and the bank, having failed to obtain reimbursement in full by execution on the corporate property, filed a bill to make the directors personally liable. It was held, 1. That the letter did not make the directors personally liable for the debt; for, even assuming the letter to contain a representation that the directors had power to overdraw the account, and such representation to be erroneous, this was not a representation of fact which the persons making it were bound to make good, but only a mistaken representation of the law. 2. That even if the representation had been such as the directors were bound to make good, the bank could have

of the directors, any person into whose hands it comes has a right to rely and act upon its truth; and doing so, although it is not the only inducement to an investment in the stock, yet all the directors who issued or sanctioned it are liable to such party for the damages resulting to him from such investment,<sup>1</sup> and no other privity need be shown.<sup>2</sup> But in order to amount to an actionable fraud,

no remedy against them, since it had been able to enforce the same remedies against the company as if the representation had been true. *Beattie v. Lord Ebury*, L. R. 7 Ch. App. 777. Where a director of a company caused shares to be allotted to three of his infant children, and the company, being unsuccessful, was ordered to be wound up before such children attained their majority, the father was held liable for the calls due on such shares, because of his breach of duty as director in having shares allotted to infants. *Re Crever & Wheal Abraham, &c. Mining Co.*, L. R. 8 Ch. 45.

<sup>1</sup> *Morgan v. Skiddy*, 62 N. Y. 319; *United Society of Shakers v. Underwood*, 9 Bush (Ky.), 609; *Vreeland v. N. J. Stone Co.*, 32 N. J. Eq. 188; *Cross v. Sackett*, 2 Bosw. (N. Y.) 617; *Newbery v. Garland*, 31 Barb. (N. Y.) 121; *Clark v. Dickson*, 6 C. B. N. s. 453; *Hill v. Lane*, L. R. 11 Eq. 215. In *Peck v. Gurney*, L. R. 6 H. L. 377, it is held that the liability of the directors is limited to parties who purchased of or were misled by them. *Henderson v. Lacon*, L. R. 5 Eq. 249; *Burnes v. Pennell*, 2 H. L. Cas. 497; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Davidson v. Tulloch*, 3 Macq. 783.

<sup>2</sup> In *Salmon v. Richardson*, 30 Conn. 360, directors of an insurance company fraudulently permitted false statements to be officially made and published by the president and secretary of the company as to its assets and condition, and the plaintiff was induced thereby to insure in the company. The company was at the time utterly insolvent, and after the loss of the property insured the plaintiff was able to get nothing upon his policy. In a suit brought by him against the directors, it was held that they were not saved from personal liability for the injury by reason of the fact that they were acting officially.

The declaration, after alleging that the insurance company was incorporated and carrying on the business of insurance, and that the defendants were directors of the company, averred "that the said directors, the defendants, for the purpose of giving the company a fictitious credit, and to increase its business, etc., did falsely and fraudulently represent, etc.," and that the plaintiff relying upon such representations made his contract of insurance with the company. It was held that the declaration was not insufficient, by reason of the manner of alleging the acts of the defendants, for a recovery against them personally; and that the want of privity between the plaintiff and the defendants, by reason of the fact that his contract was with the company and not with them, did not affect his right of recovery against the defendants, since the action was founded, not upon the contract, but upon the fraud of the defendants in inducing him to make it. Under such circumstances an action would lie, *although the parties were entire strangers to each other*. R., one of the defendants, denied his participation in the fraud, and all knowledge that certain bonds belonging to him were represented in the official statements of the president and secretary as the property of the company. It was held that evidence was admissible on the part of the plaintiff to show that the president and another director had shortly before the publication solicited R. to make some arrangement by which the bonds could be represented to be the property of the company; also, that a receipt given by him to the company acknowledging that the bonds were the property of the company, and were held by him subject to its order, was admissible; and that acts of R. after the plaintiff had taken his policy, not in themselves independent, but connected with and growing out of the previous

*the statements must relate to matters peculiarly within their knowledge, and must be statements of facts, and not of law or opinions.*<sup>1</sup> The director's knowledge of the fraud will not be presumed, but both his knowledge and participation therein must be proved,<sup>2</sup> and each director is liable for his own fraud, and not for that of his associates on the board; therefore none except those who participated in the fraud should be sued.<sup>3</sup>

fraudulent purpose, were admissible to show his knowledge of and participation in the fraud. See also *Calhoun v. Richardson*, 30 id. 211.

<sup>1</sup> *Morgan v. Skiddy*, *ante*; *New Brunswick, &c. Railw. Co. v. Conybeare*, 9

H. L. Cas. 711; *Rashdale v. Ford*, L. R. 2 Eq. 750.

<sup>2</sup> *Wakeman v. Dalley*, 51 N. Y. 57; *Arthur v. Griswold*, 55 id. 401.

<sup>3</sup> *Cargill v. Bower*, L. R. 10 Ch. Div. 502.

## CHAPTER IX.

## OFFICERS AND AGENTS.

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| SEC. 161. President of the Corporation,<br>Powers of. | SEC. 166. Agents, generally.   |
| 162. Superintendent.                                  | 167. When Act is without Authority,<br>but is subsequently Ratified.   |
| 163. Intermediate Agents.                             | 168. Knowledge of, or Notice to<br>Agent affects Corporation,<br>when. |
| 164. Conductors.                                      |  |
| 165. Station Agents.                                  |  |

SEC. 161. **President of the Corporation, Powers of.** — The president of a corporation is usually required to be chosen from the board of directors, and by the board. By virtue of his office he has the right to preside at all corporate meetings, and meetings of the board, and without special authority he possesses such additional powers as, by usage and necessity, are incident to his office and the usual course of business.<sup>1</sup> But unless the charter, by-laws, or the board of direc-

<sup>1</sup> Chicago, &c. R. R. Co. v. Coleman, 18 Ill. 227. In Mitchell v. Deeds, 49 Ill. 416, WALKER, J., says: "As we understand the law, a corporate body may unless otherwise provided by their charter, appoint any member of the body, or other person, by their by-laws or by resolution, an agent to transfer or dispose of their property or negotiable securities. No officer of the body has that exclusive power unless given by the charter. They may confer power on the president, treasurer, secretary, or other officer or person. But in the absence of both statutory authority and regulations of the body on the subject, the presumption might be indulged that the president, as the head of the organization, would have authority, if incident to the organization, or in conformity with the usage and custom of business. The doctrine seems to be settled that the president of a corporate body being its head, through whom the corporate affairs of the corporation are constantly performed, such acts as are incident to the execution of the trust reposed in him,

or such as custom or necessity has imposed upon the office, he may perform without express authority. And it is immaterial whether such authority exists by virtue of his office, or is imposed by the course of business of the company." Chicago, &c. R. R. Co. v. Coleman, 18 id. 297. See also, Elwell v. Dodge, 33 Barb. (N. Y.) 336. But it has been held in Massachusetts that neither the president nor the cashier of a bank has, *ex officio*, authority to transfer the property or securities of the bank, but that for this purpose they must have an express authority from the corporation or its directors. Hallowell Bank v. Hamlin, 14 Mass. 178; Hartford Bank v. Barry, 17 id. 97; Foster v. Essex Bank, 17 id. 94; Pendleton v. Bank, 1 T. B. Mon. (Ky.) 179, where it was held that a cashier had no authority, *ex officio*, to accept bills of exchange. It has been held, also, that the receiving teller of a bank, where there is one, is the only proper officer to receive deposits; and that if he receives the funds of a stranger and promises to apply them to the payment of



tors by resolution confer such authority upon him, he has, as president, no more authority to bind the corporation by contracts than any other director has.<sup>1</sup> Thus, as such, he has no authority to make contracts, or to release parties from liability to it under contracts;<sup>2</sup> or to stay the collection of an execution in favor of the corporation;<sup>3</sup> or to sell property belonging to the corporation, or to bind it by his representations in reference thereto;<sup>4</sup> or to borrow money in the name of the corporation;<sup>5</sup> or to make a mortgage upon the corporate property

a bill or note, he acts as the agent of the stranger, and not of the bank, and the bank is not liable therefor. *Thatcher v. Bank of New York*, 5 Sandf. (N. Y.) 121; *Mussey v. Eagle Bank*, 9 Met. (Mass.) 306. And that if he exceeds his authority as a teller, and certifies a check upon the bank as "good," he cannot bind the bank in this way to pay the amount of such check to any person who may afterward present it even where there is a usage of that kind. *Mussey v. Eagle Bank*, 9 Met. (Mass.) 306. But this doctrine is unsound, and in New York, it has been held that if a teller has made a practice of certifying checks, and of entering the same in a book, for the benefit of the officers of the bank, the bank is liable for checks so certified, though the teller fails to make the entry, and even though the bank has no funds of the drawer, — provided the person claiming the same is a *bona fide* holder of them. *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125. In this case the action was by a *bona fide* holder of a negotiable check, which had been certified to be good by the paying teller of the bank (the defendant) on which it was drawn; and it was held that the bank under such circumstances was liable, although the drawer had no funds in the bank with which to pay the check, and the teller exceeded his authority in certifying the check as good. It appeared in this case that the teller was in the habit of certifying the checks of customers, with the knowledge of the officers of the bank, and that he was furnished with a book for the express purpose of keeping a memorandum of such checks.

<sup>1</sup> *Hodges v. Rutland, &c. R. R. Co.*, 29 Vt. 220; *Farmers' Bank of Bucks Co. v. McKee*, 2 Penn. St. 318; *Blen v. Bear*

*River, &c. Co.*, 20 Cal. 602; *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116.

<sup>2</sup> *Titus v. Cairo, &c. R. R. Co.*, 38 N. J. L. 98; *Castor v. Titusville Gas, &c. Co.*, 63 Penn. St. 381; *Hoyt v. Thompson*, 19 N. Y. 207; *Olcott v. Tioga R. R. Co.*, 27 id. 546; *Darst v. Gale*, 83 Ill. 136; *Miller v. Rutland & Washington R. R. Co.*, 36 Vt. 452; *Sherman v. Fitch*, 98 Mass. 59; *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163; *Chicago, &c. R. R. Co. v. James*, 24 Wis. 388; *Hazard v. Durand*, 11 R. I. 195; *Olney v. Chadsey*, 7 id. 224; *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 158.

<sup>3</sup> *Spyker v. Spence*, 8 Ala. 333. But see *Savings Bank v. Benton*, 2 Met. (Ky.) 240; *Oakley v. Workmen's Union, &c.*, 2 Hilt. (N. Y.) 487, where it was held that as chief executive officer he has a right to appear and defend a suit against the corporation and employ counsel. But in Massachusetts it is held that the president of a manufacturing corporation, as such, has no authority to commence an action in favor of the corporation. *Ashuelot Mfg. Co. v. Marsh*, 1 Cush. (Mass.) 507.

<sup>4</sup> *Crump v. United States Mining Co.*, 7 Gratt. (Va.) 352. In *Walworth Co. Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 325, it was held that the president of a railroad company had no power to dispose of the personal property of the corporation, — as, in that case, railroad ties, — to secure a debt of the corporation, by virtue of the power inherent in his office, without special authority of the directors; and that as fiscal agent, under a resolution of the board authorizing him to "sell securities and purchase equipments," he did not have the power to sell such property.

<sup>5</sup> *Life, &c. Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. (N. Y.) 81.

to secure a debt against it, or when authorized in general terms to issue a mortgage, to insert an *unusual* clause therein unfavorable to the company;<sup>1</sup> or to compromise debts against the company;<sup>2</sup> or to confess a judgment against it; or to execute a bond and warrant of attorney for the entry of a judgment against it;<sup>3</sup> or indeed to do any other act relating to the property or business of the company which any other director could not do.<sup>4</sup> His powers over its business are simply the powers of an agent, such as are delegated to him by the directors.<sup>5</sup> The mere circumstance that he is president of the company does not of itself afford evidence of the existence of authority to bind it by a contract.<sup>6</sup> But the charter or by-laws may confer authority upon him to do all these acts, or the board of directors by resolution may clothe him with such authority, and the directors may subsequently ratify his acts so as to make them binding upon the corporation.<sup>7</sup> So authority to do certain acts for which there is no express authority may be acquired by him by usage, or by his predecessors in the office, or himself, having done similar acts on so many different occasions with the approval of the corporation that it may be said to have held such officer out to the world as possessed of *actual* authority to do them, so that as against persons dealing with him upon that ground, the corporation is estopped from denying his authority. The rule is, that if the president or other officer of a corporation assumes authority to do certain acts for it for which there is no express authority, if the corporation ratifies such acts either expressly or impliedly, and they are within the scope of its

<sup>1</sup> Jessup v. City Bank, 14 Wis. 331. But if the president executes a chattel mortgage of the corporation, with the assent of all the directors but one, who is away, by long-continued acquiescence therein they make it valid. Sherman v. Fitch, 98 Mass. 59. The president cannot discharge a mortgage to the corporation without special authority. Smith v. Smith, 117 id. 72.

<sup>2</sup> Olney v. Chadsey, 7 R. I. 224. Brouwer v. Appleby, 1 Sandf. (N. Y.) 158.

<sup>3</sup> Stokes v. New Jersey Pottery Co., 46 N. J. L. —.

<sup>4</sup> Trundy v. Hartford & N. Y. Steamboat Co., 6 Robt. (N. Y.) 312; Chicago, &c. R. R. Co. v. James, 22 Wis. 194.

<sup>5</sup> Titus v. Cairo, &c. R. R. Co., 37 N. J. L. 98; Leggett v. New Jersey Banking Co., 1 N. J. Eq. 541.

<sup>6</sup> Risley v. Indianapolis, &c. R. R. Co., 1 Hun (N. Y.), 204; Dabney v. Stevens, 10 Abb. Pr. (N. Y.) N. s. 39; Soper v. Buffalo, &c. R. R. Co., 19 Barb. (N. Y.) 310; National Bank v. Norton, 1 Hill (N. Y.), 572; Hoyt v. Thompson, 5 N. Y. 320; Jackson v. Campbell, 5 Wend. (N. Y.) 572; Adriance v. Roome, 52 Barb. (N. Y.) 399; Marine Bank v. Clements, 3 Bosw. (N. Y.) 600.

<sup>7</sup> Olcott v. Tioga R. R. Co., 27 N. Y. 546; New York & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30; Mechanics' Bank v. New York & New Haven R. R. Co., 13 N. Y. 632; Pixley v. Western Pacific R. R. Co., 33 Cal. 183; Pittsburgh, &c. R. R. Co. v. Wooley, 12 Bush (Ky.), 451; Southgate v. Atlantic, &c. R. R. Co., 61 Mo. 89.

authority, it is bound thereby, — the same rule prevailing in this respect as prevails in the case of other agents. Thus, in a Wisconsin case,<sup>1</sup> the vice-president of the company had for years been in the habit of appointing local agents to look after its timber lands, and these agents had sold stumpage and timber thereon, and the company had brought suit on one of these contracts and obtained judgment, the amount of which was paid to the local agent, who reported in writing every year to the vice-president, and paid over the money in his hands to the treasurer. The court held that this was sufficient to authorize the jury in finding that the company acquiesced in the authority thus exercised, and that it was bound by a contract relating to such lands made by one of these local agents.<sup>2</sup> So, if a person holds himself out as managing director of a railroad corporation, and acts as such for a long time without any objection on the part of the corporation, it is immaterial so far as strangers are concerned whether he ever received a specific appointment as such or not. If the company permits him to hold himself out as competent to dispose of its assets, his acts as to those who do not know the facts are binding upon the corporation.<sup>3</sup> Consequently, a stranger seeking to establish the authority of the president of a corporation, as to acts which he is not prohibited from doing by the charter, or which are not in excess of the powers of the corporation itself, is not in all cases compelled to show that he had express authority to do the act, but may establish such authority by showing *that he has previously assumed and exercised such authority with the assent of the corporation*,<sup>4</sup> or that the power exercised by him was such as is *usually* exercised by such officer in other, similar, corporations.

**SEC. 162. Superintendent.** — The real authority of a superintendent, and of assistant superintendents, is such as is conferred upon them by the by-laws or by the board of directors, or by the usages of the corporation, and such as are incident to their duties and actual authority; and in determining whether or not the corporation is bound by contracts entered into by them, these elements are the important factors: —

<sup>1</sup> Chicago, &c. R. R. Co. v. James, 24 Wis. 388.

<sup>2</sup> See also Kennedy v. Cotton, 28 Barb. (N. Y.) 59. Upholding the proposition that a corporation is bound by even the unauthorized acts of its officers, where it has ratified them. Barnes v. Trenton Gas

Light Co., 27 N. J. Eq. 33; Southgate v. Atlantic, &c. R. R. Co., 61 Mo. 89; Fayles v. National Ins. Co., 49 id. 380.

<sup>3</sup> Walker v. Detroit Transit Railway Co., 47 Mich. 338.

<sup>4</sup> Walker v. Detroit Transit Railway Co., 47 Mich. 338.

1. What is his actual authority ?
2. What powers are incident to his actual authority ?
3. What acts are usually done by such officers ?
4. What has the corporation permitted him to do, habitually ?

He acts as the general agent of the directors in the running and operation of the railroad, and is usually the officer who has at least the general supervision of the employment of the necessary help, and the immediate general management of all the business relating to the operation of the road. He is employed or appointed by the directors, and within the scope of his duties and powers, actual or implied, can bind the corporation where the directors themselves could do so. If, as is generally the case, the powers and duties of a superintendent are not defined, then his authority is to be measured by usage, and what he has been permitted to do by the corporation, and the incidents thereof. The rule may be said to be that *the powers of an agent of a corporation are such as the directors have permitted him to exercise within the limits of the charter*,<sup>1</sup> and if it is shown that upon several occasions, as well before as after the act

<sup>1</sup> In *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546, the directors of a railroad corporation relinquished the management of the road for a period of years to the president, allowing him to buy property for the use of the corporation, and to give the notes of the corporation for the price; and when, at the end of the three years, the managers again resumed the discharge of their appropriate duties, they took possession of the road and of all the property thus procured by the president, and continued to use such property for several years, without question as to the manner in which it had been obtained. It was held that under such circumstances the acts of the assumed agent could not be repudiated. The powers of an agent of a corporation are such as he is allowed by the directors or managers of the corporation to exercise, within the limits of the charter; and the silent acquiescence of the directors or managers may be as effectual to clothe the agent with power, as an express letter of attorney. To show that the president of a corporation had authority to draw, in the name of the corporation, a certain note, evidence is admissible that he had, on various occasions, as well after as before, executed similar

bills and notes which had been paid, and the sums thus expended entered into the accounts which were before its managers for years without objection. If the treasurer of a corporation is permitted to accept drafts and indorse notes payable to the corporation, and to do other similar acts whereby he is held out to the public as having the general authority implied from his official name and character, the corporation is bound by his acts, done within the scope of such implied authority. And an indorsement and transfer by such treasurer, of a negotiable instrument belonging to the corporation, made in pursuance of such express or implied authority, will pass a valid title to the indorsee. *Lester v. Webb*, 1 Allen (Mass.), 34. Though the by-laws of a corporation do not confer on its general agent the power of accepting bills, yet if the agent has been in the habit of accepting bills which the company has paid, it will be bound by an acceptance given by him under like circumstances. *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44; *Com. Bank of Lake Erie v. Norton*, 1 Hill (N. Y.), 501; *Exchange Bank v. Monteath*, 17 Barb. (N. Y.) 171.

with which it is sought to charge the corporation, he performed similar acts with the approval of the corporation, it is sufficient to establish his authority to do the act in question;<sup>1</sup> and both his appointment<sup>2</sup> and his authority may be inferred from his open and approved acts,<sup>3</sup> even though by the charter the appointment is required to be in writing. But where there are no approved acts from which an appointment or authority can be inferred, the written authority must be produced, if possible; but if it cannot be,<sup>4</sup> or if the appointment was not in fact made by writing, then it may be proved by parol.<sup>5</sup> It would be useless, and would afford no test of the powers and authority of a superintendent of a railroad company, to refer to all the cases in which it has been held that a general manager or superintendent had or had not power to bind the corporation by certain acts; because the actual powers conferred upon such officer by different companies, as well as the usages of corporations in that respect, may differ essentially, so that a rule applicable in one

<sup>1</sup> *Olcott v. Tioga R. R. Co.*, *ante*. If officers of a corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as the cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts as cashier will *bind the corporation*, although no written proof is, or can be, adduced of his appointment. *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 79. See also *Burgess v. Pue*, 2 Gill (Md.), 254; *McCullough v. Annapolis & Elkridge R. R. Co.*, 4 Gill (Md.), 58.

<sup>2</sup> *Alabama, &c. R. R. Co. v. Kidd*, 29 Ala. 221; *Regina v. Grimshaw*, 16 L. J. N. S. Q. B. 385; *Planters' Bank v. Bivingsville Cotton Mfg. Co.*, 10 Rich. (S. C.) L. 9. The agent of a bank, without objection that parol evidence was not competent to prove his authority, swore that he was authorized to transfer certain promissory notes held by the bank; it was presumed that he was authorized to make the transfer, by a resolution of the directors,

as required by the statute. *Warner v. Chappell*, 32 Barb. (N. Y.) 309. There is no presumption that a sale of corporate property ordered by a *director* was made by authority of the company. *Moody v. London, &c. Railway Company*, 1 B. & S. 290, or that corporate agents have exceeded their authority, or made representations without sufficient authority. *Carey v. Cincinnati, &c. R. R. Co.*, 5 Clarke (Iowa), 357. Third persons may be estopped from denying an agent's authority. Thus the obligor in a bond given to a corporation for the price of land, reciting the contract of the corporation to convey, is estopped from questioning the authority of the agent who made the contract, if the corporation have done no act indicative of a design to repudiate it. *Augusta Bank v. Hamblet*, 35 Me. 491.

<sup>3</sup> *Baltimore v. Norman*, 4 Md. 352; *Northern Central R. R. Co. v. Bastian*, 15 Md. 494; *Elysville Mfg. Co. v. Okisko Co.*, 5 id. 152.

<sup>4</sup> *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. (Mass.) 282.

<sup>5</sup> *Hamilton v. Newcastle R. R. Co.*, 9 Ind. 359; *Richardson v. St. Joseph Iron Co.*, 5 Blackf. (Ind.) 146; *Williams v. Christian Female College*, 29 Mo. 250; *Hooe v. Alexandria*, 1 Cranch (U. S. C. C.), 90.

case might have no application in another. It may be said, however, that the powers of a general superintendent of a railroad corporation are necessarily extensive.

In England, and in some cases in this country,<sup>1</sup> it has been held that the general manager or superintendent of a railway has, as incident to his employment, authority to bind the company to pay for surgical attendance bestowed at his request upon a servant of the company, injured by an accident upon its railway.<sup>2</sup> It seems to us that the doctrine of these cases is sound, and dictated by sound public policy. That he has authority to employ surgeons to attend to passengers who are thus injured, has never been denied, and probably never could be successfully, because of the duty which the company assumes to transport them safely, and its consequent liability, if by negligence it fails to do so. To say that, under such circumstances, injured passengers must be left without medical aid, unless they can employ and pay for it themselves, until the board of directors can be called together and vote upon the matter, is contrary to the dictates of humanity, and contrary also to the interests of the company; whose duty, and whose interests alike require that such injured passengers should be cared for in the most speedy, as well as best possible manner, to diminish as far as possible the damages which the company might be liable to pay to them for the injuries inflicted. In such cases, the power is implied from the authority and control which the superintendent has over the operation of the road; and yet, the liability of the company to passengers so injured depends entirely upon the question whether it was induced by negligence, and can only be determined by a jury; and such also is the case in reference to an injury received by a servant in its employ. It cannot be said, as a matter of law, that the corporation is not liable for an injury inflicted upon its servant while engaged in the discharge of his duties, because there are many instances in which they are

<sup>1</sup> *Walker v. Great Western Railway Co.*, L. R. 2 Exchq. 228; *Toledo, &c. R. R. Co. v. Rodrigues*, 47 Ill. 188; *Pacific R. R. Co. v. Thomas*, 19 Kan. 206.

<sup>2</sup> In *Marquette, &c. R. R. Co. v. Taft*, 28 Mich. 289, the court, in the absence of any evidence to show that the superintendent had authority to employ medical attendance in such cases, were equally divided upon the question whether such authority is incident to his authority as

superintendent. In *Cairo v. Mahoney*, 82 Ill. 173, it was held that but slight evidence would be required to show that a conductor of a train, or a station agent, who calls a physician to attend an injured employé, was authorized to do so by the company. See also *Indianapolis, &c. R. R. Co. v. Morris*, 67 id. 295. But see *Tucker v. St. Louis, &c. R. R. Co.*, 54 Mo. 177, where it was held that it would not be presumed that they had such authority.

liable; and it is a question for the jury in most cases to say whether or not the facts are such as to fix the company with liability. There is certainly no presumption that the company is not liable. Then why is it not within the power of the superintendent, in cases of great emergency, at the expense of the company to employ surgical attendance for a servant injured in its service, as well as for passengers injured while being transported upon its road? The authority is to be inferred from his authority and control over the entire operation of the road of the company, and his consequent duty to save the company as far as possible from loss in its operation.<sup>1</sup>

In California it has been held to be the duty of the superintendent of a railroad company to give to the assessors a list of the property of the corporation for taxation, under a statute requiring corporations to furnish such a list.<sup>2</sup> In Indiana<sup>3</sup> it is held that it will be presumed that the general superintendent of a railroad company has authority to make contracts for the fencing of the road, and the jury may sometimes infer authority. Thus, in an English case,<sup>4</sup> the plaintiff had some quicks which were carried at his expense by the railway company to the N. station on its line. By the leave of F., the general superintendent of the railway, the plaintiff put them into a piece of ground of the company's, adjoining the station, to keep them alive. Afterwards, wishing to remove them, he applied to the station clerk, who would not permit him to take them, but referred him to F. who refused to let him have the quicks. He subsequently applied to B., the managing director of the company, and met with a like refusal. The plaintiff thereupon brought trover against the company, but offered no evidence to show what were the respective duties of the general superintendent or managing director of the railway. It was held that it was the duty of a railway company trading largely as a carrier on its lines, to have some servants authorized to give directions and act for the company on all occasions, as the exigency of the traffic might require; that the jury might therefore infer that the general superintendent and managing director had authority to act for the company in all mat-

<sup>1</sup> Indianapolis, &c. R. R. Co. v. Morris, 67 Ill. 297. In Pacific R. R. Co. v. Thomas, 19 Kan. 256, it was held that he had authority to contract for board and attendance for an injured employé. Atchison, &c. R. R. Co. v. Reece, 24 Kan. 223.

<sup>2</sup> People v. Stockton, &c. R. R. Co., 49 Cal. 415.

<sup>3</sup> New Albany, &c. R. R. Co. v. Haskell, 11 Ind. 301.

<sup>4</sup> Taff Vale Railway Co. v. Giles, 2 E. & B. 822.

ters in the course of the ordinary business of the company as a carrier. It would be impossible to define specifically the powers of a superintendent or general manager of a railroad, but the tests given will be found sufficient in a given case; and the same rules apply to masters of transportation, master mechanics, and indeed to all the officers and agents of such corporations.

SEC. 163. *Intermediate Agents.* — There is only a slight distinction in a legal sense between the officers of a corporation and its ordinary agents. They are one and all mere agents of the corporation, and each, within the sphere of his authority and duties, can as effectually bind it as the other can, and except in so far as the statute or by-laws made in pursuance thereof have defined the duties or powers of officers, the same rules for determining the validity of their acts are applied in their case as in the case of ordinary agents; the distinction is merely one of degree. The officers of a corporation, especially those for whose election or appointment provision is made in the charter or by-laws, are clothed with the duties and powers incident to such offices, whether so designated in the statute or not, and independently of any other delegation of authority from the corporation; and as to those duties and powers, as well as to such as are expressly or impliedly conferred upon them by the corporation, they are its *immediate* agents, while those who are appointed or employed by them to discharge specific duties are *intermediate* agents.

As from the very nature of the business of a railroad corporation it is impossible to conduct it without these intermediate agencies, the authority of direct agents to delegate certain of their powers to such intermediate agents is conclusively presumed; and, regardless of the actual powers conferred upon them, it is presumed that such intermediate agents are clothed with all the authority necessarily or apparently incident to the position which they hold, and to the discharge of the duties imposed upon them, as well as such as they have been *permitted* to exercise which do not come fairly within the presumption;<sup>1</sup> and their authority to bind the corporation in respect to matters coming clearly within those powers is unquestionable.<sup>2</sup> Their authority need not be conferred by writing,<sup>3</sup> and even

<sup>1</sup> Washburn v. Nashville, &c. R. R. Co., 3 Head (Tenn.), 638; Tanner v. Oil Creek R. R. Co., 53 Penn. St. 411; Medbury v. New York, &c. R. R. Co., 26 Barb. (N. Y.) 554; Perkins v. Portland, &c. R. R. Co., 47 Me. 573; Alabama, &c. R. R. Co. v. Kidd, 29 Ala. 221; Chicago, &c. R. R. Co. v. Coleman, 27 Ill. 297.

<sup>2</sup> Alabama, &c. R. R. Co. v. Kidd, ante.

<sup>3</sup> Nichols v. Oliver, 36 N. H. 218; Bank of Middlebury v. Rutland & Wash-



if conferred by writing, need not be proved by a production of the writing, unless the question is reduced to one of actual authority. An agency may be established by parol by showing what the agent has been accustomed to do for his principal, and that the act of the agent for which it is sought to charge the principal, was apparently within his authority.<sup>1</sup> But authority must in some way be established. No individual member can represent the corporation in their aggregate capacity, but in consequence of their consent. The requisite evidence of this, at common law, was a deed under the seal of the corporation. Aggregate corporations established by statute are not restricted to that formality. They have powers given them to order their affairs, and to appoint and employ agents by vote, or in such other manner as the corporation may by their by-laws direct. But no person is an agent for them *who proceeds without any authority*, either by letter of attorney or by a corporate vote, or who acts outside the authority given him; that is, his acts will not charge them, *unless subsequently assented to by some act of the corporation*. Thus, a claim for work done on a turnpike was held not to be supported, where the plaintiffs could not prove a request for its performance by an authorized agent of the corporation, by proof that the plaintiff's men were seen at work upon the road by different members of the corporation, and by an agent of the corporation who was authorized to bind the corporation only by *written* contracts.<sup>2</sup> But in this case, if an agent of the corporation who had done so with the assent of the corporation on previous similar occasions, had promised to pay for the work if the contractor would perform it, the corporation would have been bound. Thus, where a railway company's engineer promised to pay for material for the use of a contractor engaged in building a bridge upon the company's railway, it was held that proof that the engineer had previously made like contracts, which the corporation had ratified, was sufficient to establish his

ington R. R. Co., 30 Vt. 151. His authority may be implied from his course of action, and its ratification by the corporation. *Bank of Lyons v. Demmon*, H. & D.'s Supp. (N. Y.) 398; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392.

<sup>1</sup> *Whitney v. South Paris Mfg. Co.*, 39 Me. 316; *Narragansett Bank v. Atlantic*

*Silk Co.*, *ante*; *Hamilton v. Newcastle, &c.* R. R. Co., 9 Md. 359.

<sup>2</sup> *Hayden v. Middlesex Turnpike Co.*, 10 Mass. 397; *Burdick v. Champlain Glass Co.*, 11 Vt. 19. See also *Williams v. Pigott*, 2 Exch. 201; *Nevins v. Henderson*, 5 Eng. Railw. Cas. 684; *Spottiswood's Case*, 39 Eng. Law & Eq. 520; *Cox v. Midland Railway Co.*, 18 Law J. N. S. Exch. 345.

authority.<sup>1</sup> But merely by virtue of his position, and as an incident thereto, it cannot be presumed that an engineer has authority to bind the corporation by his contracts. His authority to do so must be established by proof of actual authority, or of facts from which such authority can be inferred.<sup>2</sup>

Where a corporation has power to do some act, and, as incident to that act, to render itself liable for contracts or representations made in and about the doing of that act, it can appoint an agent to do the act; and from the mere fact of such appointment the same powers will flow to the agent as if he had been appointed by an individual; provided only that the powers so flowing could have been exercised by the corporation itself.<sup>3</sup>

No formal resolution of the board of directors of a corporation is required to appoint an agent or define his powers. An appointment may be implied, and they may affirm the acts of an assumed agent, and thus be bound by them.<sup>4</sup> Where one has the actual charge and management of the business of a corporation, with the knowledge of the directors or officers whose duty it is to attend to them, this is evidence of his authority, without showing any vote or other corporate act constituting him the agent of the corporation; and the company will be bound by his contracts made on their behalf, within the apparent scope of the business thus intrusted to him.<sup>5</sup> The appointment of an agent either by a power under seal, or by resolution, *or by the usual course of business* is allowable.<sup>6</sup> A general appointment as an agent duly authorized to do certain things, gives limited powers only;<sup>7</sup> but these limited powers may be shown to have been extended by the course of business which the corporation

<sup>1</sup> *Beattie v. Delaware, Lackawanna, &c. R. R. Co.*, 90 N. Y. 643.

<sup>2</sup> *Gardner v. Boston & Maine R. R. Co.*, 70 Me. 181. In *Thayer v. Vt. Central R. R. Co.*, 24 Vt. 440, it was held that there is nothing in the general duties of an engineer which will authorize him to employ others to do work on the road which by express contract the corporation has employed a contractor to do. See also *Vanderwerker v. Vt. Central R. R. Co.*, 27 Vt. 125. In *Powrie v. Kansas Pacific R. R. Co.*, 1 Col. 529, it was held that an engineer had no authority as such to pledge the company to pay an employé of a contractor who is engaged in building the road for work thereon.

<sup>3</sup> *Sharp v. Mayor, &c. of New York*, 40 Barb. (N. Y.) 256.

<sup>4</sup> *Bank of Lyons v. Demmon, Hill & D. Supp.* (N. Y.) 398. The authority from a corporation to its agent to order tenants to quit need not be under seal. *Wolf v. Goddard*, 9 Watts (Penn.), 544.

<sup>5</sup> *Goodwin v. Union Screw Co.*, 34 N. H. 378.

<sup>6</sup> *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192; *Bank of Middlebury v. Rutland & Washington R. R. Co.*, 30 Vt. 159.

<sup>7</sup> *Wilson v. Genessee Mut. Ins. Co.*, 14 N. Y. 418.

has permitted the agent to pursue, or by its assent to acts not embraced within his actual authority.<sup>1</sup>

It is a fundamental principle of the law of agency, that the principal is bound only by the authorized acts of his agent. But this authority may be shown not only by a written instrument conferring the authority, or by a verbal authority where that is sufficient, but by the acts of the principal in holding the agent out to the world as having authority to act in the particular matter.<sup>2</sup> Strangers dealing with the agent of a corporation are not bound to inquire what the corporation has in fact authorized him to do, but may deal with him in reference to those powers which it has held him out to the world as being possessed of,—in other words, in reference to his apparent authority.<sup>3</sup> The same rules in this respect apply to corporations as apply in the case of individuals, and a person who is clothed with authority to do an act for them at all is treated as being clothed with authority to bind them in respect to all matters incident thereto.<sup>4</sup> Thus, where an agent had authority to sign contracts of shipment, and his name was signed to a particular contract as such agent by the clerk in his office, the execution of such contracts being a part of his duties, it was held that the defendants were bound thereby.<sup>5</sup> The maxim *qui facit per alium, facit per se* applies with full force to corporations; and the rule is not a doubtful one, either in policy or principle, that in transactions where one of two persons must sustain a loss, the loss must fall upon him who has made it possible for the other, innocently, to be placed in a position where loss might result to him except for the application of this rule. It would be disastrous to commercial, as well as other interests, if a person, by acting through the agency of another, could shield himself from liability for such person's acts *ad libitum*. Fortunately, no such rule exists, and he who intrusts authority to another, in whatever department of business, is bound by all that is

<sup>1</sup> *Com. v. Ohio, &c. R. R. Co.*, 1 Grant's Cas. (Penn.) 129. A single act of an assumed agent, and a single recognition of it by the corporation, if sufficiently unequivocal, positive, and comprehensive in its character, may be sufficient to establish an agency to do other similar acts. *Wilcox v. Chicago, &c. R. R. Co.*, 24 Minn. 269.

<sup>2</sup> *Comstock, J.*, in *Mechanics' Bank v. New York, &c. R. R. Co.*, 13 N. Y. 632;

*Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 id. 125.

<sup>3</sup> *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Magill v. Kauffman*, 4 S. & R. 318; *City of Covington v. Covington, &c. Bridge Co.*, 10 Bush (Ky.), 69.

<sup>4</sup> *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; *Newell v. Smith*, 49 Vt. 255; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550.

<sup>5</sup> *Newell v. Smith, ante*.

done by his agent *within the scope of his apparent power*, and cannot screen himself from the consequences thereof upon the ground that no authority in fact was given him to do the particular act, unless the act was clearly in excess of his apparent authority, or was done under such circumstances as to put the person dealing with him upon inquiry as to his real authority. It is always a question of fact whether the act was done under such circumstances that the person dealing with the agent had a right to believe that he was clothed with authority to do the particular act in question.

The rule may be said to be, that restrictions upon an agent's apparent authority are not binding upon third persons, where there is nothing to put them upon inquiry as to the extent of his actual authority.<sup>1</sup> The question is not what the powers of the agent in fact were, but what power did the company hold him out as possessing?<sup>2</sup> From the business with which the agent was intrusted, had the person dealing with him a right to understand that he had authority to do the particular act, in reference to which the principal denies his authority?<sup>3</sup>

But the general doctrine in reference to corporate agents, whether general or special, has been held to be that parties dealing with them must take notice of such authority as is conferred upon them by the charter, organic act, articles of association, or other constituting instruments, and perhaps the by-laws adopted by the corporate body, in accordance with the organic or fundamental laws of its constitution; for such laws are supposed to be public, and all parties dealing with corporate agents are presumed to have notice of the same.<sup>4</sup> In a recent case where this question was involved, DANIELS, J., said: "The president is, at most, the agent of the company, created under a special legislative act defining the rights and privileges of the body, and the manner in which they should be enjoyed. This the plaintiff is to be regarded as knowing. For all persons dealing with the officers or agents of corporations are bound to know that they act either under its charter or by-laws, or the usages

<sup>1</sup> Wood's Law of Fire Insurance, 644; Commercial Ins. Co. v. Ives, 56 Ill. 402; Columbia Ins. Co. v. Cooper, 50 Penn. St. 331; Union Mut. Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222.

<sup>2</sup> Eclectic Life Ins. Co. v. Fahrenkrug, 68 Ill. 463.

<sup>3</sup> Aetna Ins. Co. v. Maguire, 51 Ill. 342; Washington Fire Ins. Co. v. David-

son, 30 Md. 91; Home Life Ins. Co. v. Pierce, 5 Ins. L. J. (Ill.) 290; Farmers' &c. Ins. Co. v. Cheshunt, 50 Ill. 111; Franklin Fire Ins. Co. v. Murray, 73 Penn. St. 13.

<sup>4</sup> Adriance v. Roome, 52 Barb. (N. Y.) 399; Wild v. Bank of Passamaquoddy, 3 Mas. (U. S. C. C.) 505; State v. Commercial Bank, 14 Miss. 218.

which may be shown to exist defining the extent of their authority. They must, in doubtful cases, acquaint themselves with the extent of that authority, or otherwise submit to the consequences resulting from their omission to do that."<sup>1</sup> In support of this doctrine it is claimed that all persons may acquaint themselves with the general statutes of incorporation, and with the articles of association, or other instruments by which parties may associate and become incorporated under general statutes; that if they fail to acquaint themselves with them, and the authority of the corporate agents provided for by such acts, articles, or instruments, it is their own fault; and if they give credit to any person not thereby authorized to act in reference to the particular matter, they must be content to look to the agent only, and cannot look to the company whom he represents. Even a stranger who deals with a corporate agent is bound to take notice of such limitations of his authority as are contained in the organic law or articles of association of the body corporate.<sup>2</sup>

SEC. 164. **Conductors.** — The conductor of a railway train by virtue of his employment has ordinarily no authority to bind the corporation by a contract. But as he is invested with authority to control all the movements of the train, and is bound to look out for the safety and reasonable comfort of the passengers, exigencies may arise in which by virtue of his position he may make contracts which would be binding upon the corporation, *where they become indispensably necessary for the performance of his duties.* As, where by some sudden disaster the further progress of his train became impossible, and it was necessary to employ teams to take the passengers and baggage to another point upon the road to enable them to pursue their journey with as little delay as possible, there is no doubt of his authority to employ such teams to transport the passengers to such point. Or if the train is derailed while upon its trip, and it becomes necessary to employ men or teams to place it back upon the track, he would have under ordinary circumstances authority to bind the corporation by a contract therefor; or if any of the employees upon the train are disabled or desert the employment

<sup>1</sup> *Risley v. Ind., &c. Co.*, 1 Hun (N. Y.), 202. See also *North River Bank v. Aymer*, 3 Hill (N. Y.), 262; *Mechanics' Bank v. New York, &c. R. R. Co.*, 13 N. Y. 599; *McCullough v. Moss*, 5 Den. (N. Y.) 567; *Adrian v. Roome*, 52 Barb. (N. Y.) 399; *Dabney v. Stevens*, 40 How. Pr. (N. Y.) 341; *Salem Bank v. Gloucester*, 17 Mass. 1; *Lowell Savings Bank v. Winchester*, 8 Allen (Mass.), 109.

<sup>2</sup> *Ernest v. Nicholls*, 6 H. L. 419; *Smith v. Hull Glass Co.*, 11 C. B. 926.

while upon the trip, he has authority to employ substitutes in behalf of the company to finish the trip; but except in such rare and exceptional instances, which relate exclusively to his duties and their faithful performance, his authority to bind the corporation by a contract cannot be inferred. But for acts done by him in the discharge of his duty as conductor of a train, the company is responsible, although they are in direct opposition to its instructions and orders;<sup>1</sup> as, if he exacts illegal fare from a passenger,<sup>2</sup> or gives a passenger who pays his fare to him counterfeit, illegal, or worthless money in making change,<sup>3</sup> or for an assault upon a passenger,<sup>4</sup> or other wrongful acts committed by him in the discharge of his duties, which will be treated in a subsequent chapter.

**SEC. 165. Station Agents.**—A person who is put in charge of a station by a railway company has apparently all the power and authority requisite to do and effectuate the business of the company at that station. He has control over the depot, and authority to exclude persons therefrom who persist in violating the reasonable regulations prescribed for their conduct;<sup>5</sup> and in enforcing such regulations, the corporation is liable for any excesses committed by him. Such agents are presumed to have authority to make contracts for the transportation of freight, and in the absence of any adequate notice to the public of any limitations upon their authority in that respect, the corporation will be bound thereby,<sup>6</sup> both as to rates and as to expedition of transportation and delivery.<sup>7</sup> But it is held that it will not be presumed that he has authority to bind the company

<sup>1</sup> *Porter v. New York Central R. R. Co.*, 34 Barb. (N. Y.) 353.

<sup>2</sup> *Porter v. New York Central R. R. Co.*, *ante*.

<sup>3</sup> *Conn. v. Ohio, &c. R. R. Co.*, 1 Grant's Cas. (Penn.) 329. In this case an action was brought by the State to recover a penalty under a statute, for passing illegal paper currency by one of the conductors to a passenger in making change with him. The court held that the commonwealth could not recover unless there was some evidence to show that the conductor was authorized to pass such illegal notes by the corporation; but that the corporation is presumed to know as much about the conduct of their agents as anybody else, and that if they knew that their agents were in the habit of paying

out illegal notes that would be an approval of the act; and that an open, notorious custom of all the ticket agents and conductors upon the road to pay out illegal notes in making change with passengers, was evidence which should be left to the jury, from which to find whether the custom was authorized by the company.

<sup>4</sup> *Ramsden v. Boston & Albany R. R. Co.*, 104 Mass. 117; *Rounds v. Delaware, Lackawanna, &c. R. R. Co.*, 5 T. & C. (N. Y.) 475; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *Craker v. Chicago, &c. R. R. Co.*, 36 Wis. 657.

<sup>5</sup> *Com. v. Power*, 7 Met. (Mass.) 596.

<sup>6</sup> *Pruitt v. Hannibal & St. Joseph R. R. Co.*, 62 Mo. 527.

<sup>7</sup> *Deming v. Grand Trunk R. R. Co.*, 48 N. H. 455.

to have cars ready for a shipper at a particular time, but that the question whether he has such authority is one of fact for the jury.<sup>1</sup> But whether he has authority to make the contract in question or not, in the first instance, yet if the company avails itself of the benefits thereof, it will not afterwards be permitted to repudiate it. Thus, where a local agent of a railroad company was authorized to make a special contract for transporting a lot of corn from Illinois to Boston, it was held that although he transcended his actual authority, and made a contract to return a part of the freight charged, if the company availed itself of the benefits of the contract it could not afterwards repudiate it.<sup>2</sup> Indeed, from necessity, and from the usual course of business, these agents must in the absence of notice to the public of any special limitations upon their authority, be treated as the representatives of the corporation at their respective stations, with full authority to bind it by general or special contracts relative to the transportation of freights over the road. Being authorized to receive, receipt for, and bill goods for shipment, the public has a right to presume that they have authority to bind the corporation by contracts relating thereto. If a station agent gives a bill of lading of goods before they are received, the company is liable for money advanced thereon in good faith.<sup>3</sup>

At the common law, a carrier is not bound to deliver goods at a point beyond its line;<sup>4</sup> therefore it will not be presumed that a station agent has authority to bind the company by a contract beyond its line; but it is bound by a contract entered into by him to deliver goods at an unusual place upon its own line;<sup>5</sup> but a general agent has authority to contract for the delivery of freight beyond the company's line; but even in such a case the contract must be clear and explicit, and will not be inferred, either from the

<sup>1</sup> *Wood v. Chicago, &c. R. R. Co.*, 59 Iowa, 196.

<sup>2</sup> *Toledo, &c. R. R. Co. v. Elliott*, 76 Ill. 67.

<sup>3</sup> *Armour v. Michigan, &c. R. R. Co.*, 65 N. Y. 111. But see *Baltimore, &c. R. R. Co. v. Wilkens*, 44 Md. 11, where it was held that the company might show that the agent signed the bill fraudulently and that the goods were never received by it.

<sup>4</sup> *People v. Chicago, &c. R. R. Co.*, 55 Ill. 95; *Cobb v. Iowa Central R. R. Co.*, 38 Iowa, 601; *Erie R. R. Co. v. Wilcox*,

84 N. Y. 239; *Grover & Baker, &c. Co. v. Missouri Pacific R. R. Co.*, 70 Mo. 672; *Piedmont Mfg. Co. v. Columbia, &c. R. R. Co.*, 19 S. C. 353.

<sup>5</sup> *Southern Express Co. v. McVeigh*, 20 Gratt. (Va.) 264; *Grover & Baker S. M. Co. v. Mo. Pacific Railway Co.*, 70 Mo. 672; *Mann v. Birchard*, 40 Vt. 326; *Phillips v. North Carolina R. R. Co.*, 78 N. C. 294; *Cummins v. Dayton, &c. R. R. Co.*, 9 Am. & Eng. Ry. Cas. 36 (Ind.); *Webber v. Great Western R. R. Co.*, 3 H. & C. 771.

fact that the goods were billed through<sup>1</sup> or that the freight was paid through in advance.

Of course, the question as to whether an ordinary station agent has authority to make a contract for the shipment and delivery of goods to a point beyond its own line, must depend upon the usual course of business in that respect upon the road in question. The presumption would be that he has no authority to make a contract binding upon the company beyond its own line; but if it has permitted its agents to make through contracts, it will be bound by such contracts.<sup>2</sup> In their case, as in reference to all other agents, in the absence of notice of any special limitations upon their authority, the public has a right to regard them as clothed with all the authority which their position and the duties incumbent upon them apparently give them, as well as such additional authority as they have acquired by the approved course of discharging their duties.

**SEC. 166. Agents, generally.**—The law of agency is especially applicable to business corporations, because all their business must be conducted by agents. Especially is this the case as to railroad companies; therefore, as has previously been stated, the power of its officers to delegate authority to agents is necessarily presumed,<sup>3</sup> except as to matters which the statute has expressly conferred upon them in their official capacity; and even as to those, in most instances, they can bind the corporation and the stockholders by ratifying the acts of an agent to whom such powers were delegated in an official mode;<sup>4</sup> as in such cases, by such confirmation the act becomes the act of the board or officer, and therefore the act of the corporation. As to all acts within the scope of an agent's apparent authority, a person, where there is nothing to put him on inquiry as to his actual authority, may deal with an agent without stopping to inquire what his real authority is; and as to all matters coming fairly within the scope of such apparent authority, the prin-

<sup>1</sup> *Armstrong v. Grand Trunk R. R. Co.*, 2 P. & B. (N. B. 445; *Mullarky v. Philadelphia, &c. R. R. Co.*, 9 Phila. (Penn.) 114.

<sup>2</sup> *Grover & Baker S. M. Co. v. Missouri Pacific R. R. Co.*, 70 Mo. 672.

<sup>3</sup> *Montgomery R. R. Co. v. Hurst*, 9 Ala. 513; *Kitchen v. Cape Gerarden, &c. R. R. Co.*, 59 Mo. 514; *Alabama, &c. R. R. Co. v. Kidd*, 29 Ala. 221; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 96

U. S. 640; *Northern Central R. R. Co. v. Bastian*, 15 Md. 494; *Santa Clara Mining Association v. Meredith*, 49 Md. 389; *Darst v. Gale*, 83 Ill. 136; *Hazard v. Durant*, 11 R. I. 195.

<sup>4</sup> *Rutland & Burlington R. R. Co. v. Thrall*, 35 Vt. 586; *Silver Hook Road v. Greene*, 12 R. I. 164; *Farmers', &c. Ins. Co. v. Chase*, 56 N. H. 341; *Pike v. Bangor, &c. R. R. Co.*, 68 Me. 445; *Monmouth, &c. Ins. Co. v. Lowell*, 59 id. 304.



principal will be bound by the acts of the agent as well as though the act had been done by himself.<sup>1</sup> It is enough that the agent was held out to the world as possessed of the requisite authority.<sup>2</sup> An agent has implied authority only to do such acts as relate to his own particular duties, and the most difficult question in the law of agency is the one which involves the question, whether the acts of an agent are within the scope of his authority.<sup>3</sup> The determination of this question frequently involves a consideration of the objects and purposes of the corporation; a construction of the fundamental laws of its being; a consideration of the customs in different countries and States in reference to the general powers and duties of various officers and agents; the general statutory provisions relating to it; and the general customs of the corporation, and of the community where it is established or does business. Authority conferred upon an agent may be general or special, and the former may be general, but limited to a particular matter. But whether general or special, and whether conferred orally or by writing and authenticated with the corporate seal, the authority conferred is always held to confer the usual means of accomplishing the object. Thus, if a general authority is given to collect, receive, and pay all the debts due by, or to, the principal, it will occur to every one who reflects upon the nature of such a trust, that numberless arrangements may be required fully to accomplish the end proposed; such as settling accounts, adjusting disputed claims, resisting unjust claims, answering or defending suits; and these subordinate powers (or, as they are sometimes called, mediate powers) are, therefore, although not expressly given, understood to be included in, and a part of, or incident to, the primary power.<sup>4</sup> In accordance with this doctrine it has been held that authority to procure a note to be discounted, implied an authority to indorse it in the name of the principal and bind him by such indorsement, as such a course

<sup>1</sup> Rutland, &c. R. R. Co. v. Thrall, *ante*.

<sup>2</sup> Houghton v. Embrook, 4 Camp. 88.

<sup>3</sup> Blanchard v. Blackstone, 102 Mass. 343; Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326; Hopkins v. Mehaffy, 11 S. & R. (Penn.) 126; Regents, &c. v. Detroit, &c., 12 Mich. 138; Sweetzer v. Mead, 5 id. 107; Bank of Metropolis v. Guttschlick, 14 Pet. (U. S.) 19; Story on Agency, §§ 154, 260, 266, 277;

Bank of Columbia v. Patterson, 7 Cranch (U. S.), 299; Lyon v. Adamson, 7 Iowa, 509; Am. Lead. Cas. 602; Mott v. Hicks, 1 Cow. (N. Y.) 513.

<sup>4</sup> Howard v. Baillie, 2 H. Bl. 618; Withington v. Herring, 5 Bing. 442; 2 Bell's Com. 387, art. 412 (4th ed.); Rogers v. Kneeland, 10 Wend. (N. Y.) 218; Peck v. Harriott, 6 S. & R. (Penn.) 146; Sprague v. Gillett, 9 Met. (Mass.) 91; Fowler v. Bledsoe, 8 Humph. (Tenn.) 509.

would ordinarily be necessary in order to accomplish the purposes desired.<sup>1</sup>

So an authority to adjust a loss on a policy has been held to confer the power to submit the matter to arbitration;<sup>2</sup> an authority to sell lands includes an authority to receive the purchase-money;<sup>3</sup> an authority to purchase grain includes the right to waive or modify a contract made in reference to grain;<sup>4</sup> an authority to sell a horse carries, by implication, the authority to warrant, unless restricted in this respect.<sup>5</sup> And it is also held that the authority includes all the various means which, under the circumstances of the case, are allowed by the custom or the usages of trade. Thus, if an agent is authorized to sell goods, this will be construed to authorize the sale to be made upon credit, as well as for cash, if this course is justified by the usages of trade, and the credit is not beyond the usual period; for it is presumed that the principal intends to clothe his agent with the power of resorting to all the customary means to accomplish the sale, unless he expressly restricts him.<sup>6</sup> And where a municipal corporation clothed its agents with full power and authority to make a contract, which was made accordingly, it was held binding upon the corporation, although there was no formal acceptance of the same by vote, and even where it was afterward rejected by the corporation.<sup>7</sup>

**SEC. 167. When Act is without Authority, but is subsequently Ratified.** — Where an agent does an act in excess of his authority, the principal is not bound thereby, if within a reasonable time after it comes to his knowledge, he repudiates it, but the option to avoid the contract must be exercised by the principal within a reason-

<sup>1</sup> *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354.

<sup>2</sup> *Goodson v. Brooke*, 5 Camp. 163.

<sup>3</sup> *Peck v. Harriott*, 6 S. & R. (N. Y.) 149.

<sup>4</sup> *Anderson v. Coonley*, 21 Wend. 279.

<sup>5</sup> *Fenn v. Harrison*, 3 T. R. 757; 3 Chit. Com. and Man. 200; *Paley on Agency*, 209; 1 *Bell's Com.* 387, art. 412 (4th ed.). But the right to warrant in such cases has been denied. See *Gibson v. Colt*, 7 Johns. (N. Y.) 390; *Nixon v. Hyserott*, 5 id. 58.

<sup>6</sup> *Story on Agency*, § 60; *Paley on Agency*, by Lloyd (3d ed.), 198, note; 1 *Livermore on Agency*, 103; *Newson v.*

*Thornton*, 6 East, 17; 2 *Kent's Com.* 622; *McKinstry v. Pearsall*, 3 Johns. (N. Y.) 319; *Van Allen v. Vanderpool*, 6 id. 69; *Goodenow v. Tyler*, 7 Mass. 36; *Clark v. Van Northwick*, 1 Pick. (Mass.) 343; *Laussatt v. Lippincott*, 6 S. & R. (Penn.) 386; *Gerbler v. Emery*, 2 Wash. (U. S. C. C.) 413; *Greeley v. Bartlett*, 1 Me. 172; *Forrestier v. Bordman*, 1 Story (U. S.), 43.

<sup>7</sup> *Davenport v. Hallowell*, 10 Me. 317; *Junkins v. School District*, 39 id. 220; *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Kingsbury v. School District*, 12 Met. (Mass.) 99.

able time after being fully apprised of the circumstances of the agent's engagement, or his assent and ratification will be presumed.<sup>1</sup>

What constitutes a reasonable time necessarily depends on the circumstances of the particular case. Where the consequences of delay are or may prove injurious to the other contracting party, especially where large expenditures, to the knowledge of the principal, are being made on the faith of the validity of the contract, the law requires prompt action on his part, if he would avoid responsibility for the acts of the agent. His right to avoid, being one arising in equity, is governed by the rules upon which that court administers justice. He must speak when he should, or he will not be permitted to speak when he would. In an English case<sup>2</sup> Lord CAMDEN, adverting to the principles which govern a court of equity where a party has slept upon his rights, said: "A court of equity has always refused its aid to stale demands, where a party has slept on his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing; *laches* and neglect are always discounte-

<sup>1</sup> Sheldon, &c. Co. v. Eickmeyer, &c. Co., 90 N. Y. 607; Andrews v. Aetna Ins. Co., 92 id. 596. But he is not bound where his approval was given under a misapprehension of the facts, — Dean v. Bassett, 57 Cal. 640, — and he is in a situation to put the party *in statu quo*, — Andrews v. Aetna Ins. Co., *ante*; McDowell v. McKenzie, 65 Ga. 630, — or unless the circumstances are such as to put him on inquiry as to the real facts. Thus, where a railroad corporation receives railroad material, bought upon its credit and for its use by one of its officers without authority, and uses it for the corporate purposes for which it was designed, this is an adoption and ratification of the act of the officer. The directors using the material so purchased are bound to inquire, and are presumed to know, whether it was paid for or not; it is not, therefore, essential to an adoption of the act of the officer that the directors should know the terms of the contract. Scott v. Middletown, Unionville, &c. R. R. Co., 86 N. Y. 200. So, where one member of a firm was informed by its agent that he had, in the firm name and for its use and benefit, instituted a

suit against a firm debtor, and caused him to be arrested and detained in prison, and such partner made no inquiry as to the grounds of the arrest, gave no directions, and took no steps for the debtor's relief or discharge, — it was held that the firm was bound by the act of its agent, and both partners were responsible for its consequences. Forbes v. Hagman, 75 Va. 168. A Georgia merchant, whose agent had bought goods in New York on an unauthorized credit, but who has sold them and retained the proceeds, is bound to pay therefor. McDowell v. McKenzie, 65 Ga. 630. Where the principal receives no direct benefit from the unauthorized act of his agent, and the party dealing with the agent is not misled or prejudiced by his failure to repudiate the act promptly, and a prompt reply is not demanded by fair dealing or a usage of trade, a ratification of the act will not be presumed from his mere silence. Mobile & Montgomery Railway Co. v. Jay, 65 Ala. 113.

<sup>2</sup> Smith v. Clay, 3 Bro. C. C. 339 n.; Hart v. Dixon, 5 Lea (Tenn.), 336. But see Mobile, &c. R. R. Co. v. Jay, 65 Ala. 113.

nanced." And this doctrine is universally recognized by courts of equity.<sup>1</sup>

Therefore, where the principal has an option to avoid or stand by the contract of his agent, he is not permitted to await the issue of events, with the purpose of adopting the contract if the transaction to which it relates proves a paying one, and if not to reject it. Mere silence has often been held to give rise to a conclusive presumption of ratification, especially where good faith and fair dealing require the principal to speak, and his silence has a tendency to mislead. It is equally true, and results from the application of the same principle, that if the principal adopts a part of the act of the agent, upon full knowledge of the circumstances, he thereby ratifies the whole. He cannot elect to take a part and reject the balance. An acceptance of the benefits of the transaction imposes the obligation to assume its burdens, and operates to confirm it as a whole. And a ratification once made becomes as irrevocable, obligatory, and binding as if the act of the agent were previously authorized.<sup>2</sup>

Ratification under the circumstances named may be said to be the adoption or confirmation by the principal of a voidable act performed by the agent.<sup>3</sup> But in order to amount to a ratification, the principal must have adopted the act *with a full knowledge of all the material facts, or the circumstances must be such as should have put him upon inquiry, so that it may be presumed that he knew them.*<sup>4</sup>

<sup>1</sup> Sanderson v. Etna Iron & Nail Co., *ante*, 442; Twin Lock Oil Co. v. Marbury, 91 U. S. 587; Grymes v. Sanders, 93 U. S. 55; Brown v. County of Buena Vista, 95 U. S. 157; Clegg v. Edmonson, 8 De G. M. & G. 787; Jennings v. Broughton, 5 De G. M. & G. 126; Murray v. Graham, 6 Paige Ch. (N. Y.) 622; 2 Story's Eq. Jur. § 1520, a.

<sup>2</sup> Wood v. Rocchi, 32 La. An. 210; Adams Express Co. v. Trego, 35 Md. 47; Combs v. Scott, 12 Allen (Mass.), 493; Handman v. Ford, 12 Ga. 205; Billings v. Morrow, 7 Cal. 171.

<sup>3</sup> BREWER, J., in First National Bank, &c. v. Drake, 29 Kan. 311; James v. Atkinson, 68 Ala. 167. Where a principal brings an action upon a contract made for him by an agent, that is a confirmation of it. Benson v. Liggitt, 78 Ind. 452; Hauss v. Neblack, 80 Ind. 407; Birdman v. Goodell, 56 Iowa, 572. See also, as to

what amounts to a notification, Warder v. Potter, 57 Iowa, 515; Strausser v. Collins, 54 Wis. 102; Miles v. Ogden, 54 id. 573; Abernathie v. Consolidated, &c. Co., 16 Nev. 260; Wittenbrock v. Bellmer, 57 Cal. 12; Carter v. Roland, 53 Tex. 540; Hunter v. Sears, 82 N. Y. 327; Hoffman v. Livingston, 46 N. Y. Superior Court (N. Y.), 552.

<sup>4</sup> Curry v. Hatch, 15 W. Va. 867; Adams Express Co. v. Trego, *ante*. A mere acceptance of the benefits of an authorized contract, without knowledge of the contract, does not of itself amount to a ratification. Roberts v. Rumley, 58 Iowa, 301; Carter v. Roland, 53 Tex. 540. But where the principal accepts the benefits of a contract made by an agent, knowing that he contracted for him, it is a ratification. Taylor v. Agricultural, &c. Association, 68 Ala. 229. See also McGeech v. Hooker, 11 Ill. App. 649.

The contract must be rejected *in toto*, or it will be treated as affirmed.<sup>1</sup> Thus, in the case last cited, an agent authorized to loan money for his principal loaned it at usurious rates, and it was held that the principal could not affirm for the legal interest only.<sup>2</sup>

SEC. 168. **Knowledge of, or Notice to Agent affects Corporation, when.** — It is well settled that notice to an agent, actual or implied, relative to a matter affecting his agency and while such agency exists, is notice to the principal, and such is also the rule as to a knowledge of facts relating to the business of his agency, acquired while acting for his principal;<sup>3</sup> and this rule applies with equal force where a person in the first instance assumed to act for another without authority, but whose act in that respect was ratified by the principal, — the rule being that if he takes the benefit of the act, he must take it charged with notice of such matters as were at the time within the knowledge of the agent.<sup>4</sup> But in order to impute the knowledge of the agent to the principal, *it must be shown that he acquired the knowledge while acting as such agent; and it must relate to the business of his agency.*<sup>5</sup>

Upon this proposition, the authorities are by no means uniform, and many respectable decisions are to be found sustaining both the affirmative and the negative; but it seems to us that as the rule in either view is arbitrary, and as the notice at best is only constructive, *and may never in fact have been given to the principal*, it should be restricted to such notice and knowledge of facts as is received by the officer or agent, not only at a time when he was an officer or agent, but also when he was acting as such, and that the rule which is adopted in some of the cases,<sup>6</sup> — that the question as to whether

<sup>1</sup> Joslin v. Miller, 14 Neb. 91.

<sup>2</sup> Joslin v. Miller, 14 Neb. 91.

<sup>3</sup> Walker v. Ayers, 1 Iowa, 449; Astor v. Wells, 4 Wheat. (U. S.) 466; Reed's Appeal, 34 Penn. St. 207; Hough v. Richardson, 3 Story (U. S. C. C.), 659; Sutton v. Dillaye, 3 Barb. (N. Y.) 529; Varnum v. Milford, 4 McLean (U. S. C. C.), 93; Patten v. Merchants', &c. Ins. Co., 40 N. H. 375; Wiley v. Knight, 27 Ala. 336; Keenan v. Missouri Ins. Co., 12 Iowa, 126; Ingalls v. Morgan, 10 N. Y. 178; Felter v. Field, 1 La. An. 80; Mundine v. Pitts, 14 Ala. 84; Smyth v. Oliver, 31 id. 39; Page v. Brunt, 18 Ill. 37; Musser v. Hyde, 2 W. & S. (Penn.) 314; Fowler v. Halbert, 4 Bibb (Ky.),

52; Boyd v. Vanderkamp, 1 Barb. (N. Y.) Ch. 273; Owens v. Roberts, 46 Wis. 258; Pepper v. George, 51 Ala. 190; Rouch v. Karr, 18 Kan. 329; Allen v. Poole, 54 Miss. 323; Saulsbury v. Wimberley, 60 Ga. 78; Campau v. Konan, 39 Mich. 362; Hier v. Odell, 18 Hun (N. Y.), 314; Sooy v. State, 41 N. J. L. 394.

<sup>4</sup> Hovey v. Blanchard, 13 N. H. 145.

<sup>5</sup> Brown v. Bankers, &c. Tel. Co., 30 Md. 39. See cases cited, *post*, n. 1, p. 461.

<sup>6</sup> Fairfield Savings Bank v. Chase, 72 Me. 226; Distilled Spirits, 11 Wall. (U. S.) 356; Lebanon Savings Bank v. Hallenback, 29 Minn. 322; Dresser v. Norwood, 17 C. B. N. s. 466; Ingalls v. Morgan, 10 N. Y. 178; Hovey v. Blanch-

such notice or knowledge, received by an agent before he was appointed as such, shall be imputable to the corporation, depends upon

ard, 13 N. H. 145; *Choteau v. Allen*, 70 Mo. 290. But see *Ford v. French*, 72 id. 250. In *First National Bank of Hightstown v. Christopher*, 41 N. J. L. 435, 29 Am. Rep. 262, where this question was considered, Matthew Perrine was one of the members of the firm of M. & J. S. Perrine, and also one of the nine directors of the bank. He had notice before that the note was obtained by fraud, as it was discounted by the bank. No other knowledge of the infirmity in the consideration of the note was possessed by any director or officer of the bank. Perrine did not communicate the information to the president, cashier, or any of his associates in the directorship. The defendant contended that notice to Perrine was notice to the bank, and that therefore the bank took the paper with notice, or was a holder *malâ fide*. *DEPUÉ, J.*, said: "The general rule is that notice to an agent is notice to his principal. This general rule is not denied. The inquiry is, under what circumstances directors of a corporation are its agents for the purpose of receiving notice. The directors of a corporation are not individually its agents for the transaction of its ordinary business, which is usually delegated to its executive officers, such as the president or cashier. Directors are possessed of extensive powers, even to the extent of absolute control over the management of its affairs; but these powers reside in them as a board, and when acting as a board they are collectively the representatives of the corporation. Notice to directors when assembled as a board would undoubtedly be notice to the corporation. Under what conditions knowledge required by a director in other than his official capacity will be constructive notice to the corporation, and be binding on it, is not entirely settled in the cases. A distinction has been taken between knowledge of illegality or want of consideration of a note by a director who acts with the board in discounting it, and such knowledge on the part of a director who is not present and acting with the board when the discount is made. In the former case

it has been held that the bank is bound by his knowledge; in the latter it is not. *Bank of the United States v. Davis*, 2 Hill (N. Y.), 451; *North River Bank v. Aymer*, 3 id. 262; *National Security Bank v. Cushman*, 121 Mass. 490; *Farmers', &c. Bank v. Payne*, 25 Conn. 444; *Farrell Foundry v. Dart*, 26 id. 376; *National Bank v. Norton*, 1 Hill (N. Y.), 572; *Washington Bank v. Lewis*, 22 Pick. 24; *the President, &c. v. Cornen*, 37 N. Y. 320; 2 Lead. Cas. in Eq. 171, note to *Le Neve v. Le Neve*. This distinction has been criticised and condemned by Justice STORY as sapping 'the foundations on which the security of all banking and other moneyed corporations has been supposed to rest, to wit, that no act or representation or knowledge of any agent thereof, unless officially done, made or acquired, is to be deemed the act, representation or knowledge of the corporation itself.' *Story on Agency*, § 140, b. It will not be necessary to consider the soundness of this distinction, for it is admitted that Perrine's knowledge of the infirmity in the consideration of this note was acquired when he was acting in his private capacity; and the opening of counsel did not propose to show that he was present at the bank when the note was discounted, and participated as a director in the act of discount. Perrine simply occupied a two-fold relation. He was a member of the firm of M. & J. S. Perrine, and a director in the bank. In the absence of evidence that he acted in the capacity of a director in the discount of the note, the counsel must take their stand on the broad ground that in point of law the bank was chargeable, in virtue of his directorship, with knowledge of the private affairs of the firm. This position is obviously untenable. *Powles v. Page*, 3 C. B. 16. As a member of the firm and a director of the bank Perrine was in the same position as a common director in two companies. Speaking on the subject, *MELLISH, L. J.*, says: 'I cannot think that because he was a common director to the two companies, we are on that account to say that the one company has necessarily notice of every-

the circumstance *whether the fact was present in the mind of the agent when acting for the principal*, so fully, that he could not have for-

thing that is within the knowledge of the common director, and which knowledge he has acquired as director of the other company. It appears to me that a director is simply a person appointed to act as one of a board, with power to bind the company when acting as a board, but having otherwise no power to bind them.' And JAMES, L. J., characterizes the proposition that where a director of a bank is asking a loan for himself, it should be imputed to the banking company that they have knowledge of his own private affairs, as most unreasonable. *In re Marseilles Railway Co.*, L. R. 7 Ch. App. 161. The cases to the same effect are collected and commented on in the text and notes of Mr. Green's edition of Brice's *Ultra Vires*, page 424 *et seq.* The counsel sought further to place this case on the ground that Perrine owed a duty to the bank, as a director, to communicate the information he had with respect to the note, and that his permitting the note to be presented for discount without such communication was fraudulent. They cited in support of their contention, *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige Ch. (N. Y.) 127. In that case, Cheeseborough was a director of the canal company, and one of the finance committee, and also president of the bank. As president of the bank he knew that the funds in question were deposited in the bank to the credit of the canal company. They were drawn from the bank by Brown, on his checks as president of the canal company, and used for private purposes. The chancellor held, that if Cheeseborough knew the purpose of Brown in making the drafts, it was his duty to communicate the facts to the other officers of the bank or to the board of directors, and that if he neglected to do so, the bank was liable for his fraud. Cheeseborough, as president of the bank, knew the funds had been deposited in the bank to the credit of the canal company; and if he knew that it was meditated by Brown to appropriate the money to his individual use, it was incumbent on him, as an officer of the bank, not to aid in the misappropriation.

The case decided nothing more than the well-settled doctrine that a corporation is liable for the fraud of its agents acting within their authority, and in the due course of its business, and cannot shield itself from responsibility by showing that the agent also failed in his duty to the corporation. If it decided anything more, the case is directly in conflict with all the authorities, and contrary to legal principles which have been regarded as well settled; for if information within the private knowledge of a director is constructively notice to a corporation whenever it is his duty, abstractly considered, to communicate that information to his associates, the doctrine cannot practically be restricted within any bounds short of binding the corporation in all cases where a director has such private knowledge, though he may do no official act to which such information relates. See *Story on Agency*, § 1406. The case cited will not aid the defence. The fraud of Perrine, if there was any fraud in the transaction, was committed by him in the course of the business of the firm, and for the benefit of the firm exclusively. If any loss had resulted to the bank from neglect on his part in his duties as director, he might have been held liable for the consequences as between him and the bank. *Stewart v. Lehigh Valley R. R.*, 39 N. J. L. 505, 523. A corporation is liable for the fraud of its agents in transacting its business, but no case that has come under my observation has affirmed that it is also liable for the individual frauds of its agents done by them individually, and for their individual benefit exclusively. In negotiating the note with the bank, Perrine was dealing with it in his own interest, and must be regarded as a stranger to the company. *Stratton v. Allen*, 16 N. J. Eq. 229. The question how far the knowledge of an officer of a corporation, which he acquired outside of the business of the company, and which was not, in fact, communicated to the corporation, is binding upon it, when it relates to dealings between the officer and the corporation, was considered by the

gotten it,—is both unreasonable and unjust. In these cases, the court seems to lose sight of the consequences of such a rule, and also of the circumstance that, while the rule relative to such knowledge of an agent rests upon a presumption that the agent would do his duty and disclose the facts to his principal, yet that the presumption is irrebuttable, and the principal is not permitted to show that the agent did not in fact discharge this duty.

This rule opens up a new field of inquiry in such cases, which is one of fact, to wit, whether the fact sought to be imputed to the principal *was in the mind of the agent at the time of the transaction in reference to which it should be disclosed*. Who should determine this fact? If, however, as seems probable from the qualification of the rule by the courts,—to the effect that the knowledge must be so fully present to the mind of the agent when acting for the principal *that he could not have forgotten it*,—it is intended that the presumption shall be irrebuttable, then the harshness and absurdity of the rule is still more glaring. Now, who has the power to say what the capacity of the agent's memory is? It is a matter demonstrated by universal experience, that the powers of memory vary greatly in different persons, and while one person will remember even trifling circumstances for a long period, yet other equally competent persons will forget the most important facts within a very few hours. So too, it is well understood that circumstances may exist at the time of a

chancellor in *Barnes v. Trenton Gaslight Co.*, 27 N. J. Eq. 33. The bill was filed to set aside a conveyance made by executors in fraud of the powers contained in the will. The conveyance was made to Mr. Potts, who was the legal adviser of the executors, and also president of the gaslight company. Potts conveyed directly to the company, and the bill charged notice on the defendants solely on the ground that at the time of the conveyance to the company Mr. Potts was its president. On demurrer, it was held that the information which came to Mr. Potts' knowledge, as counsel of the executors, was not constructively notice to the corporation, and that the company was a *bond fide* purchaser without notice." In *Choteau v. Allen*, *ante*, it was held that the principal is affected with knowledge of such facts by the agent, as the agent had acquired previously to the agency, *and which he had in mind* at the time of

the transaction for the principal. But in *Ford v. French*, *ante*, it was held that knowledge of facts acquired by an attorney in *one* case could not be imputed to his client in another case. In *Yenger v. Banz*, 56 Iowa, 77, it was held that the principal is not affected by information imparted to his agent before the agency existed, "which has not been retained in mind by the agent." It will be seen that in all these cases the doctrine is predicated upon a doubtful presumption that the agent, by reason of the shortness of the time which has elapsed since the information was received, retained it in mind at the time of the transaction for the principal. But the trouble with the rule is, that while the presumption upon which it rests is doubtful, it is nevertheless irrebuttable, and precludes all testimony to show that the agent *did not have* the knowledge in mind, and that he did not in fact communicate it to the principal.



transaction which suppress the remembrance of important facts connected therewith, until it is too late to make use of them. There is not probably a business man who has not had the truth of this proposition demonstrated in his own experience; consequently, as there is and can be no presumption that a person carries in his mind for any considerable period a recollection of every circumstance that he has had an acquaintance with, there is no reason for the doctrine referred to. This being so, it seems to us that the only reasonable and just rule in reference to imputing the knowledge of an agent to his principal, is that which is so universally adopted, confining it to knowledge of facts relating to the agency, and acquired at a time when he was discharging the duties of his agency.<sup>1</sup>

<sup>1</sup> *Astor v. Wills*, 4 Wheat. (U. S.) 466; *Reed's Appeal*, 34 Penn. St. 207; *Walker v. Ayres*, 1 Iowa, 449; *Hough v. Richardson*, 3 Story (U. S.), 659; *Sutton v. Dillaye*, 3 Barb. (N. Y.) 529; *Wiley v. Knight*, 27 Ala. 336; *Keenan v. Missouri Ins. Co.*, 12 Iowa, 126. In *Mundine v. Pitts*, 14 Ala. 84, the court held that notice to an agent or counsel when he is engaged in another business at another time will not be constructive notice to his principal or client *employing him afterwards*. See also to the same effect, *Pepper v. George*, 51 Ala. 190; *Plympton v. Preston*, 4 La. An. 356; *Musser v. Hyde*, 2 W. & S. (Penn.) 314; *Bracken v. Miller*, 4 id. 102; *Bank of United States v. Davis*, 2 Hill (N. Y.), 452; *New York Central Ins. Co. v. Protection Ins. Co.*, 20 Barb. (N. Y.) 468; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Miller v. Illinois Central R. R. Co.*, 24 Barb. (N. Y.) 312; *Winchester v. Baltimore, &c. R. R. Co.*, 4 Md. 231; *General Ins. Co. of Maryland v. United States Ins. Co. of Baltimore*, 10 Md. 517; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; *Washington Bank v. Lewis*, 22 id. 24. In *McComb v. Chicago, &c. R. R. Co.*, 7 Fed. Rep., it was held that an officer of a corporation cannot be made a party to a bill of discovery, when he did not derive the information in his official capacity. In *National Bank v. Norton*, 1 Hill (N. Y.), 572, it was held that notice of dissolution of a partnership, published in a newspaper, and thus accidentally reaching one of several directors of a bank, is not equivalent to actual no-

tice to the bank. *Cowen, J.*, said: "He happened to know the fact of dissolution, as a director or other corporator may do, without perhaps being aware that the bank could be prejudiced by it. Not having any intimation that it was material, it is too much, even if the point were in the case, to insist on a presumption that he ever communicated the fact to the board. Not having acquired the knowledge as director, there is no room for presumption either on the ground of duty or intent." In *Bank of United States v. Davis*, 2 Hill (N. Y.), 451, where a bill of exchange was sent to a director of a bank to be discounted for the benefit of the drawer, and the former, who was a member of the board who ordered the discount to be made, received the avails, alleging that the discount was for his own benefit, it was held that the bank was chargeable with knowledge of the fraud. The court said: "The general rule is undisputed that notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is acting for the principal in the course of the very transaction which becomes the subject of the suit; for upon principles of general policy it must be taken for granted that the principal knows whatever the agent knows." "I agree that notice to a director, or knowledge derived by him while not engaged officially in the business of the bank, cannot and should not operate to the prejudice of the latter. This is clear from the ground and reason upon which the doctrine of notice to the principal

In England the rule is now as stated in the *Maine* case;<sup>1</sup> *but clear and satisfactory proof is required that the facts were so present in the*

through the agent rests. The principal is chargeable with this knowledge for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions." *North River Bank v. Aymer*, 3 Hill (N. Y.), 262, 275. In *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige (U. S. C. C.), 127, the court said: "There can be no actual loss to a corporation aggregate except through its agents or officers. The directors or trustees, when assembled as a board, are the general agents upon whom a notice may be served, and which will be binding upon their successors and the corporation. But notice to an individual director, who has no duty to perform in relation to such notice, cannot be considered a notice to the corporation. The notice which Brown and Cheeseborough had of what took place at the house of the former, on the evening of the 7th of September, was not of itself legal notice to the bank that the fund was placed under the control of the finance committee; and that Brown, although he left his signature and apparently had the control of the money the next morning, was not in fact authorized to draw it from the bank. But if Cheeseborough had been authorized by the bank, as their president and agent, to agree to receive the money on deposit, the agreement made with him, as such agent, would have been notice to the corporation, although he neglected to communicate the facts to the other officers of the bank, or to the board of directors. It is well settled that notice to an agent of a party, whose duty it is, as such agent, to act upon the notice, or to communicate the information to his principal, in the proper discharge of his trust as such agent, is legal notice to the principal." In *La Farge Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54, it was held that an insurance company taking mortgages subsequent in date

to an unrecorded deed of the same premises, is not chargeable with constructive notice of such deed from the fact that the grantor and mortgagor was at the date of both deed and mortgage a director in the insurance company. The court said: "If his position as a director could make him the agent, or rather identify him entirely with the plaintiffs in such sort as to charge them with constructive notice of all the facts with which he was personally acquainted, as to the title to lands in which they had any interest, in any case, it cannot be so when he did not become concerned as their especial agent or transact business in their behalf. Most clearly it cannot be the case where the facts concerned his own private affairs, and the transaction was one in which he was dealing with the company as a third party on his own behalf, and acting for himself with and against them." In *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517, it was held that notice given to a director of a corporation, privately, or which he acquires from rumor, or through channels open to all alike, and which he does not communicate to his associates at the board, will not bind the corporation. In *Farmers and Citizens' Bank v. Payne*, 25 Conn. 444, it was held that the knowledge of a bank director, as to the object for which commercial paper was delivered to a party offering it to the bank for discount, the director not being present when it was offered and discounted, and not having communicated his knowledge to any other director or officer, was not notice to the bank. The court said: "The general rule on this subject is that notice of a fact to an agent is notice to the principal, if the agent has knowledge of it while he is acting for the principal in the course of the transaction which is in question. And this rule is applicable equally to corporations and natural persons. Hence, knowledge of a material fact, imparted by a director of a bank to the board of directors at a regular meeting of them, is

<sup>1</sup> *Norwood v. Dresser*, 17 C. B. n. s. 466.

*agent's mind.* How is the fact to be established? If by the oath of the agent, and he states that the fact *was present in his mind*, but

obviously notice to the bank. It has also been decided in some cases, that notice to either of the directors, while engaged in the business of the bank, is notice to the bank. Whether, however, the knowledge of a director who is present at a meeting of a board of directors when paper is discounted, on his application and for his benefit, is, under the rule which has been stated, to be imputed to the bank, is a question on which there is a diversity of opinion, but one which it is unnecessary here to determine. Whether such knowledge should be treated as notice to the bank in that case would probably depend on the question whether the director should be deemed to have been acting as a director and in behalf of the bank when the transaction took place. And it is upon that point only that the difference of opinion which has been alluded to arose. In all of the cases where the question was whether the principal was to be affected by the knowledge of his agent, the latter possessed such knowledge while he was acting for the former. There is none in which it has been held, or indeed claimed, that such knowledge would have that effect while he was not so engaged, nor can we conceive any good reason for the adoption of such a principle." So, in *Farrell Foundry v. Dart*, 26 id. 376, where a defective deed had been recorded, and a director of a corporation not acting as an agent thereof, and having no management of its business otherwise than as director, went to the town records to ascertain the situation of the land, and there saw the record of the deed, but did not inform the corporation or any of its agents, it was held that the corporation was not by reason of these facts chargeable with knowledge of the deed. *Louisiana State Bank v. Senecal*, 13 La. 525. In *Housatonic Bank v. Martin*, 1 Met. (Mass.) 294, it was held that knowledge of facts by a mere stockholder in an incorporated manufacturing company or bank is not notice to the corporation of the existence of those facts. In this case the stockholder was the attorney who drew the mortgages and assignment in question. In *Smith v. South Royalton Bank*, 32 Vt. 341, it was

held that if a bank director acts in behalf of the bank in a transaction of which the bank takes the benefit, notice to the director at the time of any fact material to the transaction is notice to the bank. In *Houseman v. Girard Mut. B. & L. Association*, 81 Penn. St. 256, L., desiring a loan from plaintiffs, to be secured by mortgage on his property, plaintiffs' conveyancer ordered searches for liens; through L. he procured a certificate from the recorder that there were no mortgages on the property; on this the loan was made. There being prior mortgages given by L., not certified, on the sale of L.'s property by the sheriff the proceeds did not reach to pay the loan. It was held that the recorder was liable to the plaintiffs for the loss, and the employment of L. to procure the certificate did not affect the plaintiffs with his knowledge. The court said: "It is urged that by the employment of the owner as the agent for this purpose the defendants are affected with this knowledge of the existence of the mortgage which was omitted in the certificate. This is a very familiar principle and well settled. But it is equally well settled that the principal is only to be affected by knowledge acquired in the course of the business in which the agent was employed. This limitation of the rule is perfectly well established by our own cases, and it is not necessary to look further. *Hood v. Fahnestock*, 8 Watts (Penn.), 489; *Bracken v. Miller*, 4 W. & S. (Penn.) 110; *Martin v. Jackson*, 27 Penn. St. 508. It is a mistake to suppose that it depends upon the reason that no man can be supposed to always carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind at the time, the rule is different. It may support the reasonableness of the rule to consider that the memory of men is fallible in the very best, and varies in different men. But the true reason of the limitation is a technical one, that it is only during the agency that the agent represents and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced

that he did not communicate it to the principal, then the principal is made to suffer for the negligence or fraud of his agent as to matters

is no more notice than twenty-four hours after it had ceased would be. Knowledge can be no better than direct actual notice. It was incumbent on the plaintiff to show that the knowledge of the agent, to use the accurate language of one of our cases, 'was gained in the transaction in which he was employed.' There was not only no evidence of this offer by the plaintiff, but it was plain that it had been gained before, and in an entirely different transaction." See also *Farrington v. Woodward*, 82 id. 259. In *Hood v. Fahnestock*, *supra*, the question was of imputed knowledge by an attorney of a former deed drawn by him between other parties, and the court said: "It is now well settled that one, if in the course of his business as agent, attorney, or counsel for another, he obtained knowledge from which a trust would arise and afterward became the agent, attorney or counsel of the subsequent purchaser in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts. The reason is that no man can be supposed to carry always in his mind a recollection of former occurrences; and moreover in the case of attorney or counsel, it might be contrary to his duty to reveal the confidential communications of his client." In *Willis v. Vallette*, 4 Met. (Ky.) 186, it was held that notice to an agent is constructive notice to his principal only when acquired in the course of the transaction in which he is acting as agent. To the same effect, *Howard Ins. Co. v. Halsey*, 8 N. Y. 271. In *McCormick v. Wheeler*, 36 Ill. 114, it was held that a party cannot be charged with notice of facts within the knowledge of his attorney, of which the latter acquired knowledge while acting as attorney for another person. The court said: "The English courts have recently manifested a disposition to depart from this rule, but we deem it a principle just in itself, and founded on wise considerations of policy." In *Ford v. French*, 72 Mo. 250, it was briefly held that the knowledge acquired by an attorney while acting for one client will not affect another client, for whom he is acting at the same

time in a different case. But on the other hand: In *Donald v. Beals*, 57 Cal. 399, two mortgages, one to D. and one to N., were deposited in a county clerk's office for record, April 15, the one to D. at four o'clock, and the one to N. at five o'clock. By a clerical mistake it was noted on the D. mortgage that it was deposited on April 18. This mistake occurred in the record book and in the certificate annexed to the mortgage. N. sold and assigned her mortgage to C., who employed an attorney to examine as to the character of the security. C. did not examine the record, but his attorney had full knowledge that the mortgage to N. was not prior in record. The attorney acted both for C. and N. It was held that his knowledge was imputable to C. Said the court: "The knowledge of an attorney is the imputed knowledge of his client. It is a well-settled doctrine of English law, that if the agent, at the time of effecting a purchase, have knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby,"—citing *Distilled Spirits*, 11 Wall. (U. S.) 367. As to the question of notification to a corporation through an agent, the American cases are as follows: In *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, it was held that the circumstance that the indorser of a discounted note was a director of the discounting bank, is not constructive notice to the bank that the note was made for his accommodation. In *Washington Bank v. Lewis*, 22 id. 24, a bank director got possession of a note for discount for the owner, and instead he pledged it to the bank for his own debt. It was held that as he did not act in his capacity of director in procuring the discount, the bank was not affected by his knowledge of the circumstances under which he procured it. The court said: "The argument is, that though Thompson was not the agent of the bank, yet as he was a director, his knowledge of the facts under which the note was procured is the knowledge of the bank. If this argument could be maintained, it would follow that if a director should procure a note to be discounted, by

occurring before his agency commenced, and when he had no possible reason to apprehend such consequences, and when there is no possible way of evading them. This rule would make it exceedingly dangerous for corporations or individuals, to employ agents at all; and in this country at least, it has no considerable foothold, and in England the contrary rule was held by its ablest judges.

"Where the counsel comes to have notice of the title in another affair," says the Lord Keeper,<sup>1</sup> ". . . that shall not be such a notice as to bind the party." "If a counsel or attorney," says Lord HARDWICKE<sup>2</sup> "is employed to look over a title, and by some other transaction foreign to the business in hand has notice, this shall not affect the purchaser; for if this was not the rule of the court, it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more likely than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind."<sup>3</sup> In the case previously cited from the United States Supreme court,<sup>4</sup>— which seems to be the authority upon which the courts of this country which have adopted this doctrine predicate it,—the court did not undertake to support its position by any line of reasoning, but was satisfied to accept it simply because the English courts had adopted it; which is hardly sufficient to commend the doctrine to the better class of our courts.

the fraudulent concealment of material facts which he was bound to disclose, or even by false pretences, the bank would have no remedy. If Thompson had been authorized to discount this note, and did discount it, the argument might hold good. Whatever a director or other agent of a bank may do within the scope of his authority, would bind the bank so as to make them responsible to the person dealt with. But in the present case Thompson was the party applying for the discount, and was not acting as director, nor could he with propriety so act. The courts in this country which have adopted the rule that a principal shall be charged with knowledge of facts obtained by an agent *before* he entered upon his agency, are few, and the reasons given by them for this extraordinary doctrine are not such as will be likely to commend them to other courts." *Tagge v. Tennessee National Bank*, 9 Heisk. (Tenn.) 479; *Hart v. Farmers' Bank*, 33 Vt. 252; *Fairfield Savings*

*Bank v. Chase*, 72 Me. 226; *The Distilled Spirits*, 11 Wall. (U.S.) 356. Some Massachusetts cases are sometimes cited as sustaining this rule, but upon examination, it will be seen that the knowledge imputed to the principal was acquired by the agent during his agency. *Security Bank v. Cushman*, 121 Mass. 490; *Lunt v. Woodhall*, 113 Mass. 391.

<sup>1</sup> *Preston v. Tubbin*, 1 Vern. 287.

<sup>2</sup> *Lowther v. Carlton*, 2 Atk. 242.

<sup>3</sup> See also *Warriek v. Warwick*, 3 Atk. 294; *Le Neve v. Le Neve*, 3 id. 646; *Street v. Whittaker*, Barnard, 220; *Cross v. Smith*, 1 M. & S. 545; *Hein v. Mill*, 13 Ves. 113; *Mountford v. Scott*, 3 Madd. 34. But in this case, upon appeal, Lord ELDON made an intimation of a possible exception to this rule, foreshadowing the doctrine we have combated in the text, which has lately been seized upon by the English court as a pretext for adopting the rule so foreshadowed by him.

<sup>4</sup> *The Distilled Spirits*, *ante*.

## CHAPTER X.

## CORPORATE POWERS.

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| <p>SEC. 169. How derived: Limitations upon: <i>Ultra Vires</i>.</p> <p>170. <i>Ultra Vires</i>, continued: Illustrations.</p> <p>171. Defence of <i>Ultra Vires</i> not Admissible where the Act has been Acquiesced in.</p> <p>172. Defence not Admitted when the Contract is Executed.</p> <p>173. Defence not Admitted when it will Operate a legal Wrong.</p> <p>174. Power to deal in Stocks.</p> <p>175. Purchase of Rival Road.</p> <p>176. Authority to aid in other Enterprises.</p> <p>177. No Authority to issue Irredeemable Bonds.</p> <p>178. Acts done under two Charters.</p> <p>179. Power to Contract.</p> <p>180. Contracts made before Organization.</p> <p>181. Liable as Lessee.</p> <p>182. Contract to haul certain Quantity of Freight per Month, or at certain Rates.</p> <p>183. Contract to build Bridges, Cattle-Passes, &amp;c.</p> <p>184. Contracts as to Location of Stations.</p> <p>185. Contracts relating to Refreshment-Rooms.</p> <p>186. Free Passes, Contract to give.</p> <p>187. Contract to stop Trains at a certain Place.</p> | <p>SEC. 188. Guaranty of Bonds of other Railroad Corporations.</p> <p>189. Power to build Branches, etc.</p> <p>190. Power to Contract to carry beyond its Line: for future Freights.</p> <p>191. When Corporation may set up <i>ultra vires</i> in Defence.</p> <p>192. Who may question Act, as <i>ultra vires</i>.</p> <p>193. General summary: Rules.</p> <p>194. Right to hold Real Estate.</p> <p>195. Freight Contracts: Unequal Facilities.</p> <p>196. Preference in delivering Goods.</p> <p>197. Discrimination: Undue preference as to Freights.</p> <p>198. Circumstances justifying a Preference.</p> <p>199. Charges on branch Roads.</p> <p>200. Where Charter gives a Corporation Power to fix Rates, Rule.</p> <p>201. Contract made with two or more Agents is Entire.</p> <p>202. Tolls, what are.</p> <p>203. Leased Road: Foreign Corporations, &amp;c.: Inter-State Commerce.</p> <p>204. Facilities to other Carriers: Express Companies.</p> <p>205. When Notice of Change of Rates should be given.</p> <p>206. Remedy for illegal Charges.</p> <p>207. Pooling Arrangements.</p> |
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SEC. 169. **How derived: Limitations upon: *Ultra Vires*.**—We have already stated that a corporation is a mere creature of the law, and derives all of its powers from its charter;<sup>1</sup> it possesses none of the

<sup>1</sup> *Perrine v. Chesapeake, &c. Canal Co.*, 19 How. (U. S.) 172; *New London v. Brainerd*, 22 Conn. 522; *Com. v. Erie, &c. R. R. Co.*, 27 Penn. St. 339; *Brady*

*v. New York*, 20 N. Y. 312; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *St. Louis v. Webber*, 44 Mo. 547.

elements of sovereignty, and cannot go beyond the powers granted.<sup>1</sup> But while such grants will be strictly construed, so far as the powers expressly conferred thereby are concerned, and no powers except those expressly named will be treated as having been conferred upon the corporation,<sup>2</sup> yet to such express powers will be added all the implied authority requisite to carry such express powers into full effect, and to carry out and effectuate the plans and purposes of the corporation to the full extent of the actual powers granted; and the implied powers of a corporation are more numerous, and as a rule, of more value and importance than those expressly conferred. It would be impossible to specify or enumerate in a charter each and every act which a corporation may or may not do, and it is left for the courts to say what powers, *as incident to those granted*, such corporations possess; and looking to the actual powers and the purposes of the grant, they uphold all acts of the corporation which are necessary to give effect thereto.<sup>3</sup> Corporations, in addition to the express

<sup>1</sup> St. Louis v. Weber, *ante*.

<sup>2</sup> Corporations can exercise only such powers as are expressly conferred on them, and such implied powers as are necessary to enable them to perform their prescribed duties. *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83; *Bellmeyer v. Independent Dist. of Marshalltown*, 44 Iowa, 564; *Weckler v. First Nat. Bank*, 42 Md. 581; *St. Louis v. Weber*, 44 Mo. 547; *Matthews v. Skinner*, 62 Mo. 329. General words in a charter do not authorize the corporation to do acts prohibited by the general public law of the State; but must be construed in subordination to the general law. *State v. Krebs*, 64 N. C. 604. And where the general law prohibits an act, any statute under which it is claimed that a particular association has power to perform it should be construed strictly. *Aicardi v. State*, 19 Wall. (U. S.) 635. The word "improve" in a charter power to a corporation, as of a dock company, to buy, improve, or dispose of real estate, etc., will be construed as extending the powers of the company to the performance of any act, whether on or off the land, the direct and proximate tendency of which would be to enhance its value in the market. *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83.

<sup>3</sup> *Aurora Agricultural, &c. Society v. Paddock*, 80 Ill. 263; *West v. Madison*,

&c. Board, 82 id. 205; *Hahn v. Pindall*, 3 Bush (Ky.), 189; *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Com. v. Erie, &c. R. R. Co.*, 27 Penn. St. 339; *Mobile, &c. R. R. Co. v. Franks*, 41 Miss. 494; *Attorney-General v. Great Eastern Railway Co.*, L. R. 5 App. Cas. 473; *State v. Baltimore, &c. R. R. Co.*, 6 Gill (Md.), 363; *New Orleans, &c. Steamship Co. v. Ocean Dry Dock Co.*, 28 La. An. 173; *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 446; *Baltimore v. Baltimore, &c. R. R. Co.*, 21 Md. 50; *Franklin Co. v. Lewiston Savings Bank*, 68 Me. 43; *Perrine v. Chesapeake, &c. Canal Co.*, 9 How. (U. S.) 172; *Cleveland v. Norton*, 6 Cush. (Mass.) 380; *Holyoke Co. v. Lyman*, 15 Wall. (U. S.) 500; *Delaware Tax Cases*, 18 id. 206; *Auburn, &c. P. R. Co. v. Douglass*, 9 N. Y. 444; *Black v. Delaware, &c. Canal Co.*, 24 N. J. Eq. 455; *Delaware, &c. Canal Co. v. Camden, &c. R. R. Co.*, 16 id. 321; *Morris Canal, &c. Co. v. Central R. R. Co.*, 16 id. 419; *Morris, &c. R. R. Co. v. Sussex R. R. Co.*, 20 id. 542; *St. Clair, &c. Co. v. Illinois*, 96 U. S. 63; *Buffett v. Troy, &c. R. R. Co.*, 40 N. Y. 168; *McCullough v. Maryland*, 4 Wheat. (U. S.) 316; *Curtis v. Leavitt*, 15 N. Y. 9; *State v. Hancock*, 36 N. J. L. 537.

and substantial powers conferred upon them by their charters, may be said to take by inference or implication all the reasonable modes of executing the powers conferred upon them which a natural person would have in the exercise of similar powers.<sup>1</sup> Thus, a charter for a railroad corporation would be utterly worthless and inoperative, unless the corporation had authority to enter into contracts for the construction of the road, and for the purchase of materials, rolling stock, etc.; and yet, the charters as a rule do not expressly confer this power, *but it is implied as a necessary incident to the grant*; and not only does it impliedly take authority to purchase supplies, etc., but it also impliedly takes authority to purchase upon credit, and to execute all proper evidences and securities therefor, through its proper officers.<sup>2</sup> So, although the charter makes no such provisions, railroad corporations may erect and maintain repair shops, and shops for the manufacture of cars, engines, and other supplies *necessary* for the use of the corporation, although it could buy such articles as cheap or even cheaper in the market than it could manufacture them; and the power to do these things is implied from the grant because it is a necessary incident to the powers granted. It is true that this species of grant, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the statute creating it;<sup>3</sup> but this does not exclude the right to use any appropriate means to carry into effect the powers expressly granted or necessarily implied. There is a clear line of distinction between questions involving merely the *mode* of exercising powers expressly granted, and those where there is a total absence of authority. If the power to do a thing is clearly conferred, either expressly or by fair inference, the corporation is at liberty to adopt any appropriate means for its execution not expressly forbidden; as the mode and manner of its execution, in the absence of limitations, is left to the sound discretion of the corporate authority.<sup>4</sup>

<sup>1</sup> Clark v. Farrington, 11 Wis. 306; Madison, &c. Plank Road Co. v. Watertown, &c. Plank Road Co., 5 id. 178; New England Fire Ins., &c. Co. v. Robinson, 25 Ind. 536; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280; Leavitt v. Blatchford, 5 Barb. (N. Y.) 9; Brady v. Brooklyn, 1 Barb. (N. Y.) 584; Jackson v. Brown, 5 Wend. (N. Y.) 590.

<sup>2</sup> Moss v. Averill, 10 N. Y. 449; Partridge v. Badger, 25 Barb. (N. Y.) 146; Hamilton v. Newcastle, &c. R. R. Co., 9

Ind. 359; Clark v. School District, 3 R. I. 199; Mead v. Keeler, 24 Barb. (N. Y.) 20; Commercial Bank v. Newport Mfg. Co., 15 Wend. (N. Y.) 256; McMasters v. Reed, 1 Grant's Cas. (Penn.) 36; Carne v. Brigham, 39 Me. 35; Moss v. Oakley, 2 Hill (N. Y.), 265; Buckley v. Briggs, 30 Mo. 452.

<sup>3</sup> Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518; Beatty v. Knowles, 6 Pet. (U. S.) 162.

<sup>4</sup> JOHNSON, J., in C. & M. R. R. Co.



In the one case, there is an *abuse* of authority, in the other a usurpation of power which the legislature has withheld. In the

*v. Himrod Furnace Co.*, 37 Ohio St. 317; 41 Am. Rep. 509. The question as to whether an act done in a different mode from that prescribed by the charter is legal, depends upon the circumstance whether the statutory mode, as is usually the case in such matters, is merely directory, or whether by usage the company had adopted such mode of executing its powers; and if so, although the charter mode is not pursued, the company is bound. This rule was well illustrated in *Buckley v. Derby Fishing Co.*, 2 Conn. 252. In that case an action was brought upon a policy of insurance signed by the president of the company and countersigned by the assistant. The act authorizing the company to pursue the business of insurance provided that "all policies of insurance made by said company, signed by the president, or in his absence by the assistant, and countersigned by the secretary, shall be binding on said company according to the terms and tenor thereof." The defendants insisted that they were not liable upon the policy, because the secretary did not countersign it. The plaintiff showed by the books and records of the company, a practice on its part to issue policies in this way, and the court held that by such a course of practice the company rendered itself liable, *although the policy was not executed in the mode required by the charter*. "I consider it to be undoubted law," said HOSMER, J., "that a corporation may incur a liability different from the prescriptions of its charter, like individuals; it is responsible for the manner in which it permits its agents to hold it out to the world . . . what is *usually* done by the agents of a corporation in the transaction of the business confided to them, it is a fair presumption that the stockholders are cognizant of. Although they reside in different places, they have an interest in acquainting themselves with the proceedings of the corporation. The office where the business is done is open; the books of the company are subject to their inspection; and it would be absurd to suppose them ignorant of those public facts, relating to the ordinary transaction

of the corporate concerns, with which mankind in general are acquainted. In short, every transaction of the company established by proof of direct authority from the stockholder, or implied from the usual modes of doing their business, which is not against law, or a prohibition contained in their charter, is obligatory upon them." GOULD, J., said: "It is observable that the company are not, in this case, *claiming a right*, through the agency of an individual, whose authority to act for them is denied by the adverse party. It is, therefore, unnecessary to inquire whether in such a case evidence like the present could be admitted in their favor or not. Here the demand is *against* the company, upon a contract executed in their name by *Gillet*, as president, and *Wheeler*, as assistant; and both of whom, it is claimed, were the company's agents for that purpose. But to this claim it is replied, first, that by the terms of the act of incorporation, the company cannot be bound by any contract unless it is signed by the president and countersigned by the secretary; and, therefore, that this policy, not being so executed, does not bind them, even admitting that *Wheeler*, as assistant, was *de facto* employed as their agent for the purpose of countersigning. A corporation certainly cannot, by its own act, enlarge its own capacities, powers or rights; but it would be strange to say that it cannot thus voluntarily incur liabilities. If a corporation, by a corporate act, appoints an agent, under any name or title whatever, for the purpose of making, in its own behalf, any contract which it has a right to make, can the corporation itself impeach such a contract made in its name by that agent by alleging its own want of power to make such an appointment, or to contract by such an agent? The present objection must, to avail the defendants, go to this extent. But such a doctrine is in violation of all principle. A corporate body, by transgressing the limits of its charter, may doubtless incur a forfeiture of its privileges and powers; but who ever imagined that it could thus acquire an *immunity* to the prejudice of third per-

former case, the act may or may not be void, according to the circumstances; while in the latter case *it is, so long as it remains execu-*

sions? The clause in which the act of incorporation prescribes the mode of signing contains no negative words; that is, no provision that a contract signed in any other mode than that prescribed shall *not* bind the company. It would be highly unreasonable, therefore, to construe that mode as *exclusive*, to the injury of strangers, — especially as the statute is not in its nature a public one, and third persons are, of course, neither bound nor presumed to know its provisions. The case *Ex parte Meynot*, 1 Atk. 196, though not in point, contains a doctrine which, I think, has an important bearing upon the present question. That was an application to the lord chancellor to supersede a commission of bankruptcy which had been taken out against the petitioner — he being a *clergyman*. The application was founded upon the statute 21 Hen. 8, by which clergymen are *prohibited* under heavy penalties from *trading*; and their contracts, as traders, are declared ‘utterly void and of no effect.’ Lord HARDWICKE, however, dismissed the petition; and among other things observed: ‘If a man with his eyes open will break the law, that does not make void the contract. It is, undoubtedly, very improper for a person to say, I have broke the law, and therefore, I am exempt from any remedy a creditor may have against me.’ ‘I am inclined to be of opinion that the contract shall be void as to the *parson himself only*; for it would be a most extraordinary construction of the statute that the bargain shall be void *for his own benefit*; and it would be very mischievous to construe the act in such a manner.’ ‘Shall the bargain be void for the *parson’s* benefit?’ ‘This part of the act ought to be so construed as to make it a penalty on *himself only*.’ This reasoning, I repeat, applies strongly, by analogy, to the question before the court. And if the petitioner, in that case, was bound by his contract, notwithstanding the strong language of the statute of 21 Hen. 8, *a fortiori*, it would seem, ought the policy, in the present case, to bind the company, if *Wheeler* was actually their agent for the purpose of countersigning, —

whether the contract was executed in the form prescribed by the act of incorporation or not. We come, then, to the second objection made by the defendants, namely, that a corporation aggregate cannot appoint an agent except by *deed*; and that therefore no other evidence than that of a deed is admissible to prove *Wheeler’s* authority to countersign the policy. The first proposition is generally, though not universally true, as to *express* authorities; but it applies to no other. If, then, the plaintiffs were attempting to prove a specific act of the company, expressly conferring upon *Wheeler* the authority under which he is claimed to have acted, the defendants might properly insist that the fact could be proved in no other way than by proof of a corporate act. But *implied* authorities, which are almost as familiar in the law as implied promises, and which rest upon mere presumptions, are always proved by circumstantial or collateral facts, and can be proved in no other way. Usual or frequent practice in business is the ordinary evidence in such cases. The general principle is that one person, who by permitting another to act ostensibly as his agent has given him a credit with the public as such, shall, in favor of third persons, be presumed to have authorized the latter to act in that character, and be precluded from averring the contrary. This presumption is established by proof of usage or practice, — as, that the one has been in the habit of acting in the name and in behalf of the other, and that the latter, either by positive acts or by acquiescence, impliedly recognized the agency. And the presumption, to be available to any purpose, necessarily embraces all *legal requisites* to the creation of a valid authority. Hence, a deed, a by-law, or a record, may as well be presumed as any other fact. The Mayor of Kingston-upon-Hull *v. Horner*, Cowp. 102. It may be objected that the usage in this case, not being *ancient*, can afford no evidence of *Wheeler’s* authority. But the rule requiring a usage to be ancient to found a presumption is not *in pari materia*. When a title or interest is to be

*tory, as to interested parties who have not acquiesced therein, absolutely void under any and all circumstances.*<sup>1</sup> GRAY, C. J.,<sup>2</sup> in a masterly

presumed from possession, enjoyment, or *user*, lapse of time is essential. But that rule has a different object, and is founded upon different principles from any involved in the present question. It is designed to quiet long and uninterrupted possession, enjoyment, or *user*, by discouraging stale and dormant claims, and can have no application at all to questions like the present. But how, it is asked, can the usage of a corporation which is an invisible body, existing only in contemplation of law, be proved, or even known? I answer, by the acts of its officers or acknowledged agents, in the management of its ordinary concerns. This point was conceded by counsel, and decided by the court, in *Rex v. Bigg*, 3 P. Wms. 419; and in the case of *The Mayor of Kingston-upon-Hull v. Horner*, *ante*, this species of evidence was admitted to establish a claim in favor of a corporation. Now, the evidence offered in the present case, whether sufficient to prove the fact or not, certainly conduces to prove that *Wheeler* was in the habit of countersigning contracts as agent for the company; that his acts in that character have been recognized as valid by the proper officers of that body; and that the corporation, knowing or having in its own books and records the means of knowing the fact, has acquiesced in his agency, and in the present instance taken advantage of it by retaining the premium note." In *White v. The Derby Fishing Co.*, 2 Conn. 26, it was held that banks and other corporations of similar nature, authorized by their act of incorporation to contract in a particular mode, may by a course of practice render themselves liable on instruments executed in a different mode. Thus, where the statute provided that all notes and contracts signed by the president, and countersigned by the secretary, should be valid, it was held that an issue of notes and bills signed by the president, bound the corporation.

<sup>1</sup> *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. (U. S.) 381; *Monument Bank v.*

*Globe Works*, 101 Mass. 57; 3 Am. Rep. 322; *Ashbury Railway, &c. Co. v. Riche*, L. R. 7 H. L. 668. The mode of doing an act is not exclusive but concurrent. *Hood v. New York & N. H. R. R. Co.*, 22 Conn. 509; but where there is no legal power to do an act, there can be no estoppel, and the want of authority may be set up to defeat it. *Buckley v. Derby Fishing Co.*, 2 Conn. 252. While it is true that corporations are generally bound by their contracts when under seal as much as individuals, yet where a corporation is created for particular purposes, with special powers, the contract, though under their corporate seal regularly affixed thereto, does not bind it, if it appears from the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactment, that the contract was *ultra vires*, that is, that the legislature meant that such a contract should not be made; and if it is not made out that the act prohibits the contract, it must be enforced. *South Yorkshire, &c. Co. v. Great Northern Railway Co.*, 9 Exch. 55; *Mayor, &c. of Norwich v. Norfolk Railway Co.*, 4 E. & B. 397. Like natural persons they have capacity to do wrong; and when in their contracts and dealings they break over the restraints imposed upon them, an exemption from liability cannot be claimed on the mere ground that they have no power thus to act. The objection that an act was "*ultra vires*" imports, not that the corporation could not, and did not in fact, make the unauthorized contract, but that it ought not to have made it; and, therefore, rests upon the violation of trust or duty toward the shareholders; and hence it is not to be entertained, where its allowance will do a greater wrong to innocent third parties. *Bissell v. Michigan Southern, &c. R. R. Co.*, 22 N. Y. 258. Although bonds issued by a bank are illegal, yet the bank may be liable in equity for money advanced upon them. *Whitney v. Peay*, 24 Ark. 26. In a statute authorizing a medical

<sup>2</sup> *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; 41 Am. Rep. 221.

opinion, in which he carefully reviews the cases, and clearly states the principles and distinctions which underlie questions of corporate power, says: "A corporation has authority to do such business as it is authorized by its act of incorporation, and no other. It is not held by the government, nor the stockholders, as authorized to make contracts which are beyond the scope and purposes of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder who has not participated or acquiesced in the act, will restrain the corporation from carrying out the contract; and a court of common law will not sustain an action on the contract. *Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity,*" — especially where the act incorporating it is in terms declared to be a public act.<sup>1</sup>

college to mortgage its property to enable them to raise funds, a proviso restricting the use of the premises so authorized to be mortgaged was held not to apply to purchasers under a foreclosure of such mortgage. *Medical College of Ohio v. Zeigler*, 17 Ohio St. 52. A person who purchases the bonds of a municipal corporation, without actual notice of any special directions given to the officers of the corporation respecting their sale, will not be bound by such directions, if he neglected to make inquiries through want of caution only, and not with a design of avoiding knowledge. *DeVoss v. City of Richmond*, 18 Gratt. (Va.) 338. *There is a difference between exercising powers wholly foreign, and exercising legitimate powers to an improper extent.* Thus, a mining corporation which buys more land than the law allows commits a wrong which can only be inquired into by the State; and it does not thereby lose its rights as against trespassers. *Whitman Mining Co. v. Baker*, 3 Nev. 386. And even acts done by corporations in violation of their charters are not in all cases necessarily void. They

may, by such acts, acquire title to property, and transmit it to others. *Farmers' & Millers' Bank of Milwaukee v. Detroit & Milwaukee R. R. Co.*, 17 Wis. 372; *Bissell v. Michigan Southern, &c. R. R. Co.*, 22 N. Y. 258. The expression *ultra vires* in reference to corporate acts is employed in different senses. 1. It applies to acts entirely unauthorized. 2. To acts which require the consent of the stockholders, but which have been attempted without such consent. 3. To acts which are authorized for certain limited or specified purposes, but which are exercised for another purpose. 4. To acts which are authorized to be exercised in a certain mode, but which are exercised in a different mode. *McPherson v. Foster*, 43 Iowa, 48; *Miners' Ditch Co. v. Zellenbach*, 37 Cal. 543.

<sup>1</sup> *Whittenton Mill v. Upton*, 10 Gray (Mass.), 582; *Richardson v. Sibley*, 11 Allen (Mass.), 65; *Pearce v. Madison, &c. R. R. Co.*, 21 How. (U. S.) 441; *East Anglian v. Eastern Counties Railway Co.*, 11 C. B. 775; *Ashbury Railway, &c. Co. v. Riche*, L. R. 7 H. L. 653.

The same rules apply to a corporation that apply to individuals; and if a contract is made by it which is *prohibited* by law, it cannot enforce it, because the act is illegal and it is *in pari delicto* with the other party. Thus, in a New York case,<sup>1</sup> the plaintiff was a corporation created under a special act, by which it was authorized, among other things, "to grant, bargain, sell, buy, or receive all kinds of property, real, personal, or mixed, or to hold the same in trust or otherwise . . . and to advance moneys . . . upon any property, real or personal, on such terms or commissions as may be established or approved by the directors." The action was brought for the collection of two notes for \$8,000 each, executed by the defendants, and payable to their own order and indorsed by them to the plaintiff before they became due. The answer alleged, substantially, that the plaintiff was a corporation created by special act of the New York legislature, and that it had engaged in the business of banking in violation of the laws of the State, and discounted the notes in suit in the course of that business, and that the notes were made for the purpose of raising money upon them, and that they were discounted by the plaintiff and passed to the defendant's credit upon the plaintiff's books. The general statutes of New York prohibited any corporation, not expressly incorporated for that purpose, from carrying on that business, and the constitution of the State, section 4, article 8, prohibited the State legislature from passing any act granting a special charter for *banking* business. The court held that the transactions between the plaintiff and the defendants constituted *banking business* within the meaning of the statute, and that the defendant was not estopped from setting up the invalidity of the notes, as the transaction was one expressly forbidden by the laws of the State. DANIELS, J., in a very able opinion, among other things, says: "If the position urged upon the consideration of the court (by the plaintiff) should receive its sanction, the statute whose restraint has been violated would be practically repealed. For it would be held that what the legislature have declared that the plaintiff should not do might safely be carried on under the sanction of the courts. That would render the statute nugatory, which would violate the duty and authority vested in the court, and rendered obligatory upon it. The notes could not be discounted, and received in plain violation

<sup>1</sup> New York Trust & Loan Co. v. Helmer, 12 Hun (N. Y.), 35.

of the terms of the statute of the State.”<sup>1</sup> In a late Pennsylvania case<sup>2</sup> the same rule was adopted where a national bank, contrary to the prohibition of the national banking act, took a mortgage of real estate, partly to secure a *future* loan, and partly to secure the payment of pre-existing notes. The court had previously held that a mortgage given to secure the payment of *future* loans was *ultra vires*,<sup>3</sup> and in the case first cited they held that as to the *future* loans, the mortgage was void, but was good as to those existing when the mortgage was made. The doctrine of estoppel *in pais* does not extend so far as to enable a corporation to do, in effect, what is *forbidden by law, or what it is otherwise wholly incapable of doing*; and when a contract is wholly *ultra vires*, it cannot acquire validity from the circumstance that it has been treated and acted upon by the parties as a valid transaction.<sup>4</sup> Thus, where a lease was made by a railroad company, of its property and franchises *which it had no power to make*, it was held that it had no power to ratify it by accepting rent upon it.<sup>5</sup>

SEC. 170. **Ultra Vires, continued: Illustrations.**—There is no question but that railroad corporations have, as auxiliary or incident to their main or authorized business, all the powers which an individual would have under the same circumstances; and the extent of these powers is to be determined, not only by reference to the express powers conferred by the charter, but also to the nature, extent, and necessities and conveniences of the business and of the public. They have the power to take and grant property and assume obligations, in the same manner that an individual might, for the construction of their road, and for supplying it with the necessary machinery, appliances, and conveniences for the conduct of their business in all its departments. Thus, it has been held that a railroad company may erect a telegraph along its roadway, as incidental to its primary business.<sup>6</sup> So it has been held that it may put up refreshment-

<sup>1</sup> Firemen's Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; New York Life Ins. & Trust Co. v. Beebe, 7 N. Y. 364; Seneca County Bank v. Lamb, 26 Barb. (N. Y.) 595; Barton v. Port Jackson Plank Road Co., 17 id. 397; DeWitt v. Brisbane, 16 N. Y. 508; Richie v. Ashbury Ry. Co., 7 Irish App. 653.

<sup>2</sup> Woods v. People's National Bank, 83 Penn. St. 57.

<sup>3</sup> Fowler v. Scully, 72 Penn. St. 456.

<sup>4</sup> In re Comstock, 3 Sawyer (U. S. C. C.), 218.

<sup>5</sup> Ogdensburgh, &c. R. R. Co. v. Vermont, &c. R. R. Co., 4 Hun (N. Y.), 268.

<sup>6</sup> Western Union Tel. Co. v. Rich, 19 Kan. 517; Prather v. Western Union Tel. Co., 89 Ind. 501. See New York City, &c. R. R. Co. v. Central Union Tel. Co., 21 Hun (N. Y.), 261, where it was held that a telegraph company had no authority to erect its poles upon the roadway of a railroad company without its permission.

rooms along the line of its road for the convenience of passengers;<sup>1</sup> and undoubtedly instances might arise where it would have authority to put up hotels upon the line of the road for a similar purpose, where the interests of the corporation and of the travelling public require it. This is upon the principle that a corporation has, in addition to its special powers, implied authority to do all acts necessary for the full and complete utilization of its special powers which are not expressly or impliedly excluded by the terms of the grant. Thus, a railroad company has, as incident to its business, the right to engage in the cartage of goods to and from its depots.<sup>2</sup> So, where the charter confers upon the company authority "to contract for the transportation and delivery of, and to transport and deliver persons and property conveyed over its road beyond its termini," it has, as incident to such power, the right to purchase and run a steamboat from the termini of its road to the line of another.<sup>3</sup> But under an

<sup>1</sup> *Flanagan v. Great Western Railway Co.*, L. R. 7 Eq. 116.

<sup>2</sup> *Attorney-General v. Grand Trunk R. R. Co.*, 16 *Décisions des Tribunaux* (L. C.), 9.

<sup>3</sup> In *Shawmut Bank v. Plattsburgh, &c. R. R. Co.*, 31 Vt. 491, a note given by a railroad company in payment for a steamboat under such a charter, was held to be valid and binding upon it. See also *Rutland, &c. R. R. Co. v. Proctor*, 29 id. 95; *Wheeler v. San Francisco, &c. R. R. Co.*, 31 Cal. 46. A corporation created for the purpose of mining and transporting coal, with power to purchase articles for that purpose, is held to have power to purchase and run a steamboat, to transport and deliver coal. *Calloway Co. v. Clark*, 32 Mo. 305; *Moss v. Averill*, 10 N. Y. 449; *Pearce v. Madison, &c. R. R. Co.*, 21 How. (U. S.) 442. See *Downing v. Mount Washington, &c. Co.*, 40 N. H. 230; *Wiswall v. Greenville, &c. Plank Road Co.*, 3 Jones (N. C.) Eq. 183; *Watt's Appeal*, 78 Penn. St. 370. In *Rutland & Burlington R. R. Co. v. Proctor*, 29 Vt. 93, where the plaintiffs, a railway company, chartered with the usual privileges and limitations, in order to compete in business and improve the profits of their road, in all probability in good faith, purchased the boats and appurtenances of a corporation formed for carrying freight and passengers on Lake

Champlain, and subsequently sold one of these boats and furniture to the defendants, and after the sale repaired the boat and furniture at a machine shop purchased of the transportation company, and brought an action for such furniture and repairs. It was held that they could recover. The court, REDFIELD, C. J., said: "The defence is, that the contract of purchase by which the plaintiffs' company acquired the title of this boat and furniture sold the defendants, and of the shop at which the repairs were done, was beyond their powers, or as denominated in the books, *ultra vires*. It does not appear that the stockholders of the plaintiffs' company have ever objected to their making the purchase, or running the boats in connection with their road. If we regarded the question properly before the court for determination, we should not at first view, certainly, be inclined to question that such a purchase is beyond the powers of the company. And if the stockholders had applied to a court of equity at the time, to have the directors enjoined from making the purchase, the current of English decisions would probably have justified the injunction. And possibly had the State interfered by way of *scire facias* or *quo warranto*, the excess of power thus exercised by the company might be regarded as sufficient reason for revoking their charter. We say this may possibly be so

ordinary charter, although the company is authorized to do all that is necessary to put its railroad in operation, it is held not to possess

regarded, but it is not common in practice for the courts to declare the forfeiture of a railway charter when the directors have proceeded in good faith, and the property of the company is not brought in peril. But no such step has been taken, nor is this an action by which the company are sought to be charged for a contract beyond the fair scope of their charter. The defendants seek to make this defence upon the ground that the excess of power thus assumed by the company is illegal, and renders all contracts connected with the transaction inoperative by reason of such illegality. If there had been a positive prohibition of entering into a particular class of contracts, and especially if such contracts had been declared void by the charter of the company, or the general laws of the State, most unquestionably no action would lie upon the prohibited contract. But when no such prohibition exists, and it is only by construction of the charter that a class of contracts are declared to be beyond the powers of the company, and when upon this point there is such reasonable ground of doubt as to induce a court to suppose the directors may have acted in good faith, and where the question is raised by one having no interest in it, except for purposes of unjust advantage, courts have never been inclined to listen to the objections. In the present case, the most favorable view for the defendants, as it seems to us, is that the directors of the plaintiffs' company exceeded their powers in making the purchase, and that, therefore, the title of the boats and apparatus did not vest in the company; and consequently, that the funds which the directors appropriated for the purpose were misappropriated, and the directors may be compelled to account for them to the company, for the benefit of the stockholders. And possibly the funds so misapplied might have been pursued into the hands of the transportation company by showing the insolvency of the directors; but this must have been done at once, and any considerable acquiescence in the transaction will prevent the stockholders or the company from pursu-

ing the funds. And in that case the title to the property will have passed from the transportation company, *prima facie*, into the directors as natural persons. In such a state of the title the directors might most undoubtedly dispose of the property, and collect the avails as a legitimate mode of restoring the funds misapplied to the company. And for this purpose they might most unquestionably take the securities upon sale of the property, payable to the company, or stipulate that the purchaser should pay the company. And this, so far from being a continuance of the perversion of the charter powers, is the surest and only obvious mode of restoring the funds to their proper channel. The only wrong in the directors is in having exceeded their powers, and the transaction with the defendants, so far as it goes, will tend to restore a portion of the money to its rightful proprietor; and of this the defendants ought not to complain, as they are confessedly solicitous to bring the directors of the plaintiffs' company back to their legitimate functions. And if they should dispose of all the property purchased in this mode, in the manner this is sold to the defendants, it will go far to restore them to their appropriate place, — the treasury of the plaintiffs, — for the benefit of the company and its stockholders." But where there is no express or implied authority, the company has no power to purchase or operate steamboats in connection with its road. Thus in *Coleman v. The Eastern Counties Ry. Co.*, 10 Beav. 1, Lord LANGDALE, at the suit of a shareholder, restrained the corporation from using its funds to establish a steam communication between the terminus of the road (Harwich) and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and upon the ground that similar arrangements were not unusual among railway companies. Lord LANGDALE said: "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made. But I apprehend that it has nowhere been stated that



the implied power to purchase or run steamboats in connection therewith.<sup>1</sup> But it may enter into a contract with another corpora-

a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament under which those acts were done, they furnish no authority whatever. In the *East Anglian Railway Company v. The Eastern Counties Railway Company*, 11 C. B. 803, the court say the statute incorporating the defendants' company gives no authority respecting the bills in Parliament promoted by the plaintiffs, and we are therefore bound to say that any contract relating to such bills is not justified by the act of Parliament, and not within the scope of the authority of the company as a corporation, and is therefore void."

<sup>1</sup> *Pearce v. Madisen, &c. R. R. Co.*, 21 How. (U. S.) 441; *St. Joseph v. Saville*, 39 Mo. 460; *Hoagland v. St. Joseph R. R. Co.*, 39 id. 451. In *Pearce v. Madisen, &c. R. R. Co.*, *ante*, the question turned rather upon the validity of the consolidation of the companies than upon the power of the companies to purchase and run the steamboat. In that case two corporations created under the laws of Indiana to construct distinct, but connecting lines of railroad, consolidated their lines by agreement, and conducted both lines under one management without legislative authority. After the consolidation, the consolidated company purchased a steamboat to run upon the Ohio river in connection with its road. In an action upon the

note, it was held that no recovery could be had, because the consolidation was invalid, and hence there was a total lack of authority on the part of the managers to bind the companies in that way. CAMPBELL, J., in delivering the opinion of the court, said: "The rights, duties, and obligations of the defendants are defined in the acts of the legislature of Indiana, under which they are organized, and reference must be had to these to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation between the cities which are named in the act of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroad, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which there was no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor the stockholders of the corporation shall transcend their authority." He then referred to *Colman v. Eastern Counties Railway Co.*, 10 Beav. 1; *East Anglian Railway Co. v. Eastern Counties Railway Co.*, 11 C. B. 777; *Macgregor v. Dover, &c. Railway Co.*, 18 Q. B. 618, and continued: "It is contended that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an indorsee, and the only question is,

tion or person, to provide and operate a suitable steam-vessel for the transportation of traffic coming by its line, and such contract will be valid.<sup>1</sup> It has been held in England that it has no authority to guarantee to such corporation or person a certain profit from the business;<sup>2</sup> but a different doctrine is held in this country, where the authority to make any contract in that respect exists. Thus, a railroad company whose railroad extended across the State of Wisconsin, from Lake Michigan to the Mississippi River, and which was authorized by its charter to make "such contracts with any other person or corporation whatsoever as the management of its railroad and the convenience and interest of the corporation and the conduct of its affairs may in the judgment of its directors require;" and by general laws, to make such contracts with any railroad company whose road terminates on the eastern shore of Lake Michigan "as will enable them to run their roads in connection with each other in such manner as they shall deem most beneficial to their interest;" and "to build, construct and run, as part of its corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business operations of such company or companies;" and also "to accept from any other State or territory of the United States, and use, any powers or privileges applicable to the carrying of persons and property by railway or steamboat in said State or territory," — has the power, for the purpose of carrying passengers and freight in connection with its own railroad and business, to enter into an agreement with the proprietors of steamboats running, by way of the Great Lakes, between its eastern terminus and Buffalo in the State of New York, by which it guarantees that the gross earnings of each boat for two years shall amount to a certain sum. The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract mani-

had the corporation the capacity to make the contract, in the fulfilment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority." In this case there was no question made but that the plaintiff took the notes with full knowledge of the defect in the original consideration. Had the proof shown him to have been a *bond fide* holder

without notice of this defect, the question would have been quite different. *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Maccon v. Shores*, 97 U. S. 272; *Monument National Bank v. Globe Works*, 101 Mass. 57.

<sup>1</sup> *South Wales R. R. Co. v. Redmond*, 10 C. B. N. s. 675.

<sup>2</sup> *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1.

festly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited.<sup>1</sup>

A railway company has no implied power to build a canal basin;<sup>2</sup> nor, although it is authorized to erect wharves and warehouses on a navigable stream, has it authority to employ its funds in improving the navigation of the stream,<sup>3</sup> nor to build a bridge or a harbor such as is not authorized by the scope of its charter or the location of its route,<sup>4</sup> nor generally to engage or pledge its funds, or entangle its affairs in an unauthorized transaction, even though upon the speculation that it will afterwards apply for legislative authority.<sup>5</sup> There is no question but that, under the head of its implied powers, a corporation, especially a railroad corporation, may, in order to increase its business, enter into many contracts and undertakings which are not strictly within its express powers,—if they are not expressly prohibited, and are essential to promote the business of the corporation, or add materially to the convenience of its prosecution. Thus, there can be no question but that a railway corporation may build side tracks or spurs of its road to increase its facilities for receiving or depositing the freights of large manufacturing establishments upon its line, provided it can obtain the consent of the land-owners to run its tracks over their lands.<sup>6</sup> So, without special authority, where the necessities of business require it, it may erect elevators for the receipt and discharge of grain shipped over its line,

<sup>1</sup> *Thomas v. Railroad Co.*, 101 U. S. 71; *Attorney-General v. Great Eastern Ry. Co.*, 5 App. Cas. 473; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258. See also *Railway Co. v. McCarthy*, 96 U. S. 258; *Green Bay, &c. R. R. Co. v. Steamboat Co.*, U. S. S. C., March, 1883; opinion by GRAY, J.

<sup>2</sup> *Plymouth R. R. Co. v. Colwell*, 39 Penn. St. 337.

<sup>3</sup> *Munt v. Shrewsbury, &c. Railway Co.*, 13 Beav. 1. In *The New Orleans, &c. Steamship Co. v. The Ocean Dry Dock Co.*, 28 La. An. 173, it was held that the owning and navigating of steamships being a distinct business from the docking and repairing of such vessels, a corporation formed solely for the latter business can-

not lawfully engage in the former; and a subscription by such a corporation to the stock of a corporation engaged solely in the former business, is not enforceable. See *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504; *Hough v. Cook County Land Co.*, 73 Ill. 23; 24 Am. Rep. 230; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655; 19 Am. Rep. 781; *Bradley v. Ballard*, 55 Ill. 413; 8 Am. Rep. 656.

<sup>4</sup> *Mayor of Norwich v. Norfolk Railway Co.*, 24 L. J. N. s. 105; *Caledonia, &c. Railway Co. v. Helensburgh Harbor Trustees*, 2 Jur. N. s. 695.

<sup>5</sup> *Logan v. Courtown*, 13 Beav. 22.

<sup>6</sup> See *Wilson v. Furness Railway Co.*, L. R. 9 Eq. 28.

and do many other acts which, although not within the letter, are nevertheless within the spirit of the act creating it, because essential to the successful carrying out of its original scheme, and to its own convenience and to the convenience and advantage of the public. But of course there are limitations upon this vague authority, and limits beyond which the corporation cannot go, and in the present state of the authorities it is difficult to say precisely what those limitations are; but there is a strong tendency on the part of the courts to construe these powers liberally, when the acts done under them result, or are likely to result, in a positive advantage to the public, and do not come within any express statutory prohibition.<sup>1</sup>

In an Indiana case,<sup>2</sup> acting upon this principle the court held that a subscription made by a railway company to secure the permanent location of a State fair upon its line, was binding upon it, the court saying: "Although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the terms of the charter of the corporation, or of any statute prohibiting it, and the corporation has by its promise induced a party relying upon such promise and in execution of the contract, to expend money, and perform his part of the contract, the corporation is liable on the contract."<sup>3</sup>

But in a Massachusetts case,<sup>4</sup> a railroad company established for the purpose of constructing and maintaining a railroad and carrying passengers and freight thereon, and the Smith American Organ Co., the purposes of which were limited by its certificate of incorporation to the manufacture of reed organs and other musical instruments, each subscribed a stated sum for the purpose of defraying the expense of holding a "World's Peace Jubilee and International Musical Festival" in Boston. It was held that the subscriptions were *ultra vires* and not binding, *even though they were made for the purpose of increasing the proper business of each corporation from which it derived pecuniary benefit*. Such a contract cannot be held to bind a

<sup>1</sup> State Board of Agriculture v. Citizen's Street Railway Co., 47 Ind. 407; Gregory v. Patchin, 33 Beav. 595; Attorney-General v. Grand Trunk Ry. Co., 16 Decisions des Tribunaux (L. C.) 91; Low v. Central Pacific R. R. Co., 52 Cal. 53; Indianola v. Gulf, &c. R. R. Co., 56 Tex. 594; Cheever v. Gilbert Elevated R. R. Co., 43 N. Y. Superior Court, 478; Green Bay, &c. R. R. Co. v. Union Steamboat

Co., 107 U. S. 98; Branch v. Jessup, 106 U. S. 468; Attorney-General v. Great Eastern Railway Co., L. R. 5 App. Cas. 473; Forest v. Manchester, &c. Railway Co., 30 Beav. 40.

<sup>2</sup> State Board of Agriculture v. Citizen's Street Ry. Co., 47 Ind. 407.

<sup>3</sup> Hitchcock v. Galveston, 96 U. S. 311.

<sup>4</sup> Davis v. Old Colony R. R. Co., 131 Mass. 258.

railroad corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guarantee the success of any enterprise that might attract population or travel to any city or town upon or near its line. The same reasons are no less applicable to manufacturing and trading corporations established under general laws, and the purposes of which are required by those laws to be stated in their articles of association. "The power to manufacture and sell goods of a particular description does not include the power to partake in or to guarantee the profits of an enterprise that may be expected to increase the use of or the demand for such goods."<sup>1</sup>

<sup>1</sup> GRAY, J., in *Davis v. Old Colony R. R.*, *ante*, carefully reviews the cases, and eliminates their doctrine with such accuracy and precision that we give the main portion of his opinion here. He said: "There is a clear distinction, as was pointed out by Mr. Justice CAMPBELL in *Zabriskie v. Cleveland, Columbus & Cincinnati R. R.*, 23 How. (U. S.) 381, 398; by Mr. Justice HOAR in *Monument Bank v. Globe Works*, 101 Mass. 57, 58, 3 Am. Rep. 322; and by Lord Chancellor CAIRNS and Lord HATHERLEY in *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 668, 684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party. In the leading case of *Colman v. Eastern Counties Railway*, 10 Beav. 1, the directors of a railway company were restrained by injunction from carrying out an agreement by which, for the purpose of increasing its traffic, they proposed to guarantee certain profits to, and to secure the capital of, a steam-packet company, to ply between a port near one end of the railway in England and certain foreign ports; and Lord LANGDALE, M. R., said: 'To look upon a railway company in the light of a common partnership, and as subject to no greater

vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public but with the private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit, which notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must always be carefully looked to; and I am clearly of opinion that the powers which are given by an act of Parliament, like that now in question, extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned.' 'Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made; but I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by their acts; but it has been contended that they have a right to pledge, without limit, the funds of the

The doctrine of the *Indiana* case is diametrically opposed to that of the *Massachusetts* case, yet they both serve to illustrate the ten-

company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have frequently been done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which those acts are done, they furnish no authority whatever.' 10 Beav. 14, 15. And after full consideration of the case he summed up his opinion thus: 'To pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation is a thing which according to the terms of this act of Parliament they have not a right to do.' 'They have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of Parliament, and they have no power of doing anything beyond it.' 10 Beav. 17, 18. See also *Salomons v. Laing*, 12 Beav. 339, 352, 353. In *Bagshaw v. Eastern Union Railway*, 7 Hare, 114, 2 Macn. & Gord. 389, and 2 Hall & Twells, 201, where a railway company, authorized by act of Parliament to purchase a branch line, and to raise a sum of money for the purpose of constructing that line, applied part of the sum so raised to the construction of its main line, Vice-Chancellor WIGRAM, and Lord Chancellor COTTENHAM on appeal, sustained the bill of a shareholder, not only to restrain such application of the rest of the sum, but also for an account of the part already illegally expended. The same principles have been frequently applied in actions at law. In *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775, it was held that no action could be maintained by one railway company against another upon an agreement made by the latter to take a lease of the railway of the first company, and to pay the expenses incurred by that company in the soliciting and promoting of bills in Par-

liament for the extension and improvement of that railway, even if the object and effect of the agreement were to increase the profits of the defendants' railway; and Chief Justice JERVIS, in delivering the judgment of himself and Justices MAULE, WILLIAMS, and TALFOURD, said: 'This act is a public act, accessible to all, and supposed to be known to all; and the plaintiffs must therefore be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be. It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their act; but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profits of their own railway. This in truth is the same proposition in another form; for if the company cannot carry on a new trade, merely because it was not contemplated by the act, they cannot embark in other undertakings not sanctioned by their act, merely because they hope the speculation may ultimately increase the profit of the shareholders. They cannot engage in a new trade, because they are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object or the prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades, because they have only a limited authority, for the same reason they can do nothing not authorized by their act, and not within the scope of their authority. Every proprietor when he takes shares has a right to expect that the conditions upon which the act was ob-

dency of our courts in construing the general powers of railroad corporations. Both courts have always inclined towards a liberal policy.

tained will be performed; and it is no sufficient answer to a shareholder, expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary, and destined by Parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was obtained, and not expressly sanctioned by the legislature.' 'If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissentient shareholders; for if the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds.' 11 C. B. 811-813. So in *MacGregor v. Dover & Deal Railway*, 18 Q. B. 618, the Court of Exchequer Chamber, in an opinion delivered by Baron ALDERSON, in which Justices MAULE, CRESSWELL, WILLIAMS, and TALFOURD, and Baron PLATT concurred, arrested judgment in an action brought by the Dover and Deal Railway Company, upon the agreement of a person interested in the Southeastern Railway Company, to pay the expenses of an application of the latter to Parliament to authorize it to establish a connecting railway, because 'both plaintiffs and defendant here must be taken, with full knowledge of the powers conferred on the Southeastern Railway Company, to have made a contract by which the defendant is to bind the company to do an illegal act: not merely an act which they have no power to do, but an act contrary to public policy and the provisions of a public act of Parliament.' 18 Q. B. 632. In each of those cases the plaintiff had actually incurred and paid the expenses sued for. Baron PARKE

stated the rule to be, that where a corporation is created by act of Parliament for particular purposes with special powers, 'their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*, — that is, that the legislature meant that such a deed should not be made.' *South Yorkshire Railway v. Great Northern Railway*, 9 Exch. 55, 84. See also *Scottish Northeastern Railway v. Stewart*, 3 Macq. 382, 415, by Lord WENSLLEYDALE. Lord ST. LEONARDS, while asserting that 'the safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds;' and that railway companies 'have all the powers incident to a corporation, except so far as they are restrained by their act of incorporation,' and are 'bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which cannot be clearly shown not to fall within them;' and inclining 'to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express, or implied from the nature of the corporation and of the contract entered into,' — distinctly recognized that 'directors cannot act in opposition to the purpose for which their company was incorporated,' nor 'bind their companies by contracts foreign to the purposes for which they were established.' *Eastern Counties Railway v. Hawkes*, 5 H. L. Cas. 331, 371, 373, 381. Lord Chancellor CRANWORTH, in the same case, said that the English authorities above cited had 'established the proposition that a railway company cannot devote any part of its funds to an object not within the scope of its original constitution, how beneficial soever that object might seem likely to prove;' and after a review of the cases, repeated, 'It must therefore be now considered as a well-settled doctrine that a company incorporated by an act of Parlia-

While we entertain the highest respect for the Indiana court, and have always regarded it as not only able, progressive, and at the

ment for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be.' 5 H. L. Cas. 345, 348. His opinion, in which Lord BROUGHAM concurred, upon which the House of Lords held that no action would lie against a railway company on an agreement of its projectors to advance money to construct a pier and harbor at the end of a proposed branch of the railway, is to the like effect. *Caledonian & Dumbartonshire Railway v. Magistrates of Helensburgh*, 2 Macq. 391, 416, 417, 422. And he afterward observed that he thought the statement of Baron PARKE, above quoted, 'the more correct way of enunciating the doctrine, though practically it makes very little difference whether we say that the railway company has no authority given to it by its incorporation to enter into contracts as to matters not connected with its corporate duties, or that it is impliedly prohibited from so doing, because by necessary inference the legislature must be considered to have intended that no such contracts should be entered into.' *Shrewsbury & Birmingham Railway v. North-western Railway*, 6 H. L. Cas. 113, 135-137. In *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, and L. R. 9 Ex. 224, the objects for which a company, registered under the English Joint Stock Companies Act of 1862, was created, were stated in its memorandum of association to be 'to make and sell, or lend on hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents.' The directors agreed to purchase a concession for making a railway in a foreign country, and afterward (on account of difficulties existing by the law of that country) agreed to assign the concession

to an association formed there, which was to supply the materials for the construction of the railway, and to receive periodical payments from the English company. In an action at law brought by the foreign associates against the English company upon this agreement, it was held in the lower courts, as well as in the House of Lords, to be *ultra vires*. The judges below were divided in opinion upon the question whether it had been ratified by the stockholders so as to bind the company. But in the House of Lords it was unanimously held, by Lord Chancellor CAIRNS and Lords CHELMSFORD, HATHERLEY, O'HAGAN, and SELBORNE, that 'the contract was not within the scope of the memorandum of association, and was therefore void and incapable of being ratified, and the action could not be maintained.' Lord SELBORNE said: 'The action in this case is brought upon a contract, not directly or indirectly to execute any works, but to find capital for a foreign railway company, in exchange for shares and bonds of that company. Such a contract, in my opinion, was not authorized by the memorandum of association of the Ashbury Company. All your lordships, and all the judges in the courts below, appear to be so far agreed. But this, in my judgment, is really decisive of the whole case. I only repeat what Lord CRANWORTH, in *Hawkes v. Eastern Counties Railway Company* (when moving the judgment of this House), stated to be settled law, when I say that a statutory corporation, created by an act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that act. The present and all other companies incorporated by virtue of the Companies Act of 1862 appear to me to be statutory corporations within this principle. The memorandum of association is, under that act, their fundamental, and (except in certain specified particulars) their unalterable law; and they are incorporated only for the objects and purposes expressed in that memorandum. The object and policy of those provisions of the statute which prescribed



same time reasonably conservative, yet we are constrained in this instance to give our assent to the doctrine of the Massachusetts case,

the conditions to be expressed in the memorandum, and make these conditions (except in certain points) unalterable, would be liable to be defeated if a contract under the common seal, which on the face of it transgresses fundamental law, were not held to be void, and *ultra vires* of the company, as well as beyond the power delegated to its directors or administrators. It was so held in the case of the East Anglian Railway Company, and in other cases upon railway acts, which cases were approved by this House in *Hawkes' case*; and I am unable to see any distinction for this purpose between statutory corporations under railway acts, and statutory corporations under the Joint-Stock Companies Act of 1862.' 'I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association, are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do. This being so, it necessarily follows (as indeed seems to me to have been conceded in Mr. Justice BLACKBURN's judgment) that where there could be no mandate, there cannot be any ratification; and that the assent of all the shareholders can make no difference when a stranger to the corporation is suing the company itself in its corporate name, upon a contract under the common seal. No agreement of shareholders can make that a contract of the corporation, which the law says cannot and shall not be so.' L. R. 7 H. L. 693-695. In a very recent case of Attorney-General v. Great Eastern Railway, 5 App. Cas. 473, 478, in which the contract in question was held to be expressly authorized by the terms of the act of Parliament, and therefore not *ultra vires*, Lord Chancellor SELBORNE, while expressing the opinion that 'this doctrine ought to be

reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*,' declared his sense of the importance of maintaining the doctrine of *ultra vires*, as explained in the case of *Ashbury Railway & Iron Co. v. Riche*; and Lord BLACKBURN said, 'That case appears to me to decide at all events this, that where there is an act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and consequently that the Great Eastern Company, created by act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose;' although he also agreed 'that those things which are incidental to, and may reasonably and properly be done under, the main purpose, though they may not be literally within it, would not be prohibited.' 5 App. Cas. 481. These statements are the more significant because Baron BRAMWELL, in the same case below (11 Ch. D. 449, 501-503), had cast doubts upon the correctness of the decision in the case of *East Anglian Railway v. Eastern Counties Railway*; and Lord BLACKBURN himself, when a justice of the Court of Queen's Bench, had more than once approved Baron PARKE's form of stating the doctrine. *Chambers v. Manchester & Milford Railway*, 5 B. & S. 588, 610; *Taylor v. Chichester & Midhurst Railway*, L. R. 2 Ex. 356, 384; *Riche v. Ashbury Railway Carriage & Iron Co.*, L. R. 9 Ex. 264. The same principles have been clearly and positively enunciated in two unanimous judgments of the Supreme Court of the United States. In *Pearce v. Madison & Indianapolis Railroad*, 21 How. (U. S.) 441, two corporations, created by the laws of Indiana to construct distinct though connecting lines of railroad in that State, were consolidated by agreement, and con-

as embodying the best and the safest rule. As we previously stated, there must be some very careful limitations upon the implied powers

ducted the business of both lines under a common board of management, which gave notes in the name of the consolidated company in payment for a steamboat to be employed on the Ohio river and to run in connection with the railroads. After the execution of the notes and the acquisition of the steamboat, this relation between the corporations was legally dissolved. It was held, that an action brought by an indorsee against the two corporations upon the notes could not be maintained. Mr. Justice CAMPBELL, in delivering judgment, said: 'The rights, duties and obligations of the defendants are defined in the acts of the legislature of Indiana under which they were organized, and reference must be had to these to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority.' He then referred with approval to the cases of *Colman v. Eastern Counties Railway*, *East Anglian Railway v. Eastern Counties Railway*, and *Macgregor v. Dover & Deale Railway*, above cited, and added: 'It is contended, that

because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an indorsee; and the only question is, had the corporation the capacity to make the contract, in the fulfilment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority.' Judgment was therefore rendered for the defendants. It is to be observed that in that case there was no suggestion that the plaintiff took the notes sued on without notice of the illegality in the original consideration, which would have presented a different question. *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Macon v. Shores*, 97 U. S. 272; *Monument Bank v. Globe Works*, 101 Mass. 57; 3 Am. Rep. 322. In *Thomas v. Railroad Co.*, 101 U. S. 71, a railroad corporation without authority of the legislature, leased its railroad to three persons for twenty years, for the consideration of one half of the gross sums collected from the operation of the road by the lessees during the term, reserving the right at any time to terminate the contract and retake possession of the road, paying such damages for the value of the unexpired term as should be determined by arbitration. At the end of five years the corporation resumed possession, and the accounts for that period were adjusted and paid. It was held that no action could be maintained against the corporation to recover the value of the unexpired term. The opinion was delivered by Mr. Justice MILLER. It was argued by the counsel for the plaintiffs in that case that though there was nothing in the language of the charter which authorized the making of this agreement, yet 'a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its

of these corporations, and it seems to us that the line is properly drawn in the latter case. If a railroad corporation, for the purpose

execution, and the State may, by proper process, forfeit the charter.' But the court said: 'We do not concur in this proposition. We take the general doctrine to be, in this country, — though there may be exceptional cases and some authorities to the contrary, — that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.' The court then, after referring to some of the English cases above cited, and particularly to the decision of the House of Lords in *Ashbury Railway Carriage & Iron Co. v. Riche*, as establishing 'the broad doctrine that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action,' expressed the opinion that that decision 'represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle.' The court indeed further said: 'There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is, that where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with

the State, and is void as against public policy.' This proposition is supported by the cases there cited, and by many others. See *Richardson v. Sibley*, 11 Allen (Mass.), 65, 67; *Whittenton Mills v. Upton*, 10 Gray (Mass.), 582; *Proprietors of Locks & Canals v. Nashua & Lowell R. R.*, 104 Mass. 1, 6 Am. Rep. 181; *Middlesex R. R. v. Boston & Chelsea R. R.*, 115 Mass. 347. But that the decision was not intended to be put exclusively upon this ground is manifest from the terms in which it was introduced, as well as from those in which the general doctrine had been already laid down, and from the concluding sentence of the opinion. The judgments of the English courts, and of the Supreme Court of the United States, to which we have referred, do but affirm and apply principles long ago declared by this court. More than fifty years since, Chief Justice PARKER said: 'The power of corporations is derived only from the act, grant, charter, or patent by which they are created. In this Commonwealth the source and origin of such power is the legislature, and corporations are to exercise no authority, except what is given by express terms or by necessary implication by that body. No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate or the persons or property of the corporators.' *Salem Mill-dam v. Ropes*, 6 Pick. (Mass.) 23, 32. And the importance, for the security of the rights of each stockholder, of a steady adherence to the principle that 'corporations can only exercise their powers over their respective members for the accomplishment of limited and well-defined objects,' was strongly stated by Chief Justice SHAW in 1839. *Spaulding v. Lowell*, 23 Pick. (Mass.) 71, 75. As was observed in *Morville v. American Tract Society*, 123 Mass. 129, 136, 'The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is always implied where there is no positive restriction in the charter.' Thus, a corporation may let

of increasing its business, may lend its credit or expend its money in *one* enterprise entirely foreign to the purpose of its incorporation,

or mortgage property lawfully held by it under its charter, and not immediately needed for its own business. *Simpson v. Westminster Hotel Co.*, 8 H. L. Cas. 712; *Brown v. Winnisimmet Co.*, 11 Allen (Mass.), 326; *Hendee v. Pinkerton*, 14 id. 381. A corporation established 'for the purpose of manufacturing and selling glass' may contract to purchase glassware from a like corporation to keep up its own stock and supply its customers while its works are being put in repair. *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315. A corporation authorized to purchase and hold water power created by the erection of dams, and to hold real estate, may, when the water power has been lawfully extinguished, sell its lands, and as part of the contract of sale agree to raise their grade. *Dupee v. Boston Water Power Co.*, 114 Mass. 37. A railroad corporation may agree to transport as a common carrier over connecting railroads goods intrusted to it for carriage over its own line. *Hill Manuf. Co. v. Boston & Lowell R. R.*, 104 Mass. 122; *Railway Co. v. McCarthy*, 96 U. S. 258. And it cannot dispute its liability for goods delivered to it to be carried over a railroad of which it is in actual possession and use under a lease, on the ground that the lease is void. *McCluer v. Manchester & Lawrence R. R.*, 13 Gray (Mass.), 124. Several of the cases most relied on by the plaintiffs were not suits against a corporation to compel it to pay money for a purpose not within the scope of its charter, but suits by a corporation to recover money or property, which, when recovered, would be held for the lawful uses of the corporation. *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Old Colony R. R. v. Evans*, 6 Gray (Mass.), 25; *National Pemberton Bank v. Porter*, 125 Mass. 333; 28 Am. Rep. 235; *National Bank v. Matthews*, 98 U. S. 621. In *Chester Glass Co. v. Dewey*, *ante*, the plaintiff, a corporation established for the purpose of manufacturing glass, kept a shop near its factory, for the accommodation of its workmen, containing a general assortment of such goods as are usually kept in coun-

try stores; and the defendant was a carpenter, living near, who made boxes and did other carpenter's work for the corporation. In an action for the price of goods sold and delivered to him from the shop, the defendant objected that the plaintiff was not authorized by law to keep such a shop and to sell goods in this manner; and it was held that this objection could not avail him. The leading reason assigned was, 'The legislature did not intend to prohibit the supply of goods to those employed in the manufactory;' in other words, the contract sued on was not *ultra vires*. That reason being decisive of the case, the further suggestion in the opinion, 'Besides, the defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused,' was, as has been since pointed out, wholly *obiter dictum*. *Whittenton Mills v. Upton*, 10 Gray (Mass.), 599. In *Old Colony Railroad v. Evans*, *ante*, the defendant, being under contract to haul a large quantity of gravel on to lands belonging to the city of Boston, made an agreement in writing with the plaintiff corporation, by which it agreed to purchase a tract of land in Quincy, and he agreed to take gravel therefrom, and to carry it in his own cars over the plaintiff's road to Boston, paying a specified toll; the defendant afterward further agreed in writing, that if the plaintiff would purchase another tract for the same purpose, he would pay the cost of the first tract; and both tracts were purchased by the plaintiff. The objection that the corporation had no right to trade in gravel or land was raised by the defendant by way of defence to a bill in equity by the corporation for specific performance of his second agreement by accepting a deed of and paying for the first tract. There can be no doubt of the correctness of the decision overruling the objection. The corporation by its purchase had acquired a title to the land, which was good against all the world except possibly the Commonwealth; and the defendant, having knowl-

it may do so in another, and we at once concede to them authority under this pretext to open mines, to erect manufacturing establish-

edge of all the facts, did not and could not object that the title might be defeasible by the Commonwealth. *Banks v. Poitiaux*, 3 Rand. (Va.) 136; *Leazure v. Hillegas*, 7 S. & R. (Penn.) 313; *Gouldie v. Northampton Water Co.*, 7 Penn. St. 233; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370, 373; *Smith v. Sheeley*, 12 Wall. (U. S.) 358; *Commonwealth v. Wilder*, 127 Mass. 1, 6. Although it was said in the opinion that the purchase of the land seemed to have been made as a mode of promoting the purposes of the plaintiff's incorporation, the increasing of its business in transportation upon its railroad, and not as an object of trade or speculation in lands, the point adjudged was that the want of corporate capacity to purchase and sell lands was not a legal objection to the maintenance of the bill. The only authority referred to by the court was the treatise of Angell and Ames on Corporations, §§ 10, 11, 151, 153, of which the section most directly applicable is § 153, in which it is clearly laid down that a court of equity will enforce against a natural person his agreement to purchase of a corporation lands which it holds in violation of its charter, but will not enforce against a corporation its agreement to purchase lands for a purpose not authorized by its charter. The distinction is obvious. In the latter case, to enforce the agreement against the corporation is to compel the application of its funds to a purpose not authorized by law. In the former case, to compel the individual to take and pay for the property according to his agreement is the surest and most effectual means of replacing in the treasury of the corporation, for its lawful uses and the benefit of its stockholders, the funds which it had misapplied. *Rutland & Burlington R. R. v. Proctor*, 29 Vt. 93, 97. In *National Pemberton Bank v. Porter*, the point decided was, that the objection that a National bank had exceeded its powers by purchasing a promissory note from an indorsee thereof did not prevent it from maintaining an action upon the note against the maker; for the reasons, that the action was not brought

upon the contract of purchase or against any party to that contract, and that it was not necessary in this Commonwealth that the plaintiff in an action on the promissory note should have any title or interest in it. See also *Attleborough National Bank v. Rogers*, 125 Mass. 339. In *National Bank v. Matthews*, the act of Congress providing that a National bank might purchase and hold real estate for certain enumerated purposes only, of which to secure money lent at the time of taking a mortgage was not one, was held by a majority of the court, in accordance with the opinion of Chancellor Kent in *Silver Lake Bank v. North*, above cited, not to make void a mortgage given to secure the payment of a promissory note for money so lent, nor to prevent the bank from enforcing such a mortgage. A like decision was made in *National Bank v. Whitney*, 103 U. S. 99. A corporation may indeed be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract. *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Morville v. American Tract Society*, 123 Mass. 129, 137; *In re Cork & Youghal Railway Co.*, L. R. 4 Ch. 748. But when the corporation has actually received nothing in money or property, it cannot be held liable upon an agreement to share in, or to guarantee the profits of, an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it. *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*; *Macgregor v. Dover & Deal Ry. Co.*; *Ashbury Railway Carriage & Iron Co. v. Riche*; and *Thomas v. Railway Co.*, — above cited; *Downing v. Mount Washington Road Co.*, 40 N. H. 230; *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43. The Old Colony

ments, and enter recklessly into an unlimited field of enterprises which were never contemplated by the legislature or by its shareholders, and which are in no sense a legitimate incident to its actual or express authority. The proper limitations upon the power of a railway company to extend its operations beyond those primarily contemplated by their projectors is well stated by ROMILLY, M. R., in an English case.<sup>1</sup> He said "As an illustration of the manner by which a railway company might legitimately embark in projects apparently inconsistent with its means and objects, it was suggested that coals might be necessary for the purpose of the railway, and that thereupon the company might work a coal mine for that purpose, if, by so doing, it could obtain coals cheaper than by the purchase of them, and that by so doing, it would be fair and proper and not really inconsistent with the objects of the company; and that if it did work a colliery for this purpose, it would be foolish to prevent the company from obtaining a profit by the sale of such coals as were raised and not required for the company. The answer to this argument appears to me to depend upon the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental additional profit of selling coals to others; but if the prin-

Railroad Company is a railroad corporation, established by public statutes of the Commonwealth for the purpose of constructing and maintaining a railroad and carrying passengers and freight thereon. The holding of a 'world's peace jubilee and international musical festival' is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay, or to guarantee the payment of, the expenses of such an enterprise is neither a necessary nor an appropriate means of carrying on the business of the railroad corporation, is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract cannot be held to bind the corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guarantee the success of any enterprise that might attract population or travel to any city or town upon or near its

line. It follows that in the first of the actions before us there must be judgment for the defendant. The same reasons are no less applicable to manufacturing and trading corporations, established under general laws, and the purposes of which are required by those laws to be stated in their articles of association. The Smith American Organ Company was organized under the general act of 1870, chapter 224, and the purposes of its incorporation are limited by its articles of association, as appearing in the certificate thereof filed in the office of the secretary of the Commonwealth pursuant to that act, to 'the manufacture and sale of reed organs and other musical instruments.' The power to manufacture and sell goods of a particular description does not include the power to partake in, or guarantee the profits of an enterprise that may be expected to increase the use of, or the demand for, such goods."

<sup>1</sup> Lyde v. Eastern Bengal Ry. Co., 36 Beav. 10.

incipal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company, and a scheme which ought not to be permitted, however profitable it might appear to be. The prohibition or permission to carry on this trade would depend on the conclusions which the court drew from the evidence. The same observations apply here; if the use of the boat is really to assist the traffic on the existing railway, it is lawful and proper; but if the object be to extend the traffic to places beyond the railway, which the railway is never intended to reach, then it is illegal and beyond the powers of the company."

"These expressions of Lord ROMILLY," says Mr. Brice,<sup>1</sup> "are so lucid and explicit as to need nothing additional by way of explanation. *Whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this; it may not, under the pretence of fostering, entangle itself in proceedings with which it has no legitimate concern.* The courts have, however, determined that such means shall be direct, and that a company shall not enter into engagements, as, to render assistance to other undertakings, from which it anticipates a benefit to itself, not immediately but mediately, by reaction as it were from the success of the operations thus encouraged; and that all such proceedings inevitably tend to breaches of duty on the part of the directors, and to an abandonment of its peculiar objects on the part of the corporation."<sup>2</sup>

**SEC. 171. Defence of Ultra Vires not Admissible where the Act has been Acquiesced in.**—Much confusion has arisen from embracing under the term *ultra vires*, not only those acts which it is not within the power of a corporation to do, but also those which are positively prohibited, either expressly or by the policy of the law.

<sup>1</sup> Green's Brice's Ultra Vires, 88.

<sup>2</sup> But see *Law v. Central Pacific R. R. Co.*, 52 Col. 53, where it was held that one railroad company can, upon a sufficient consideration, guarantee the payment of the bonds of another railroad corporation, and *Cheever v. Gilbert Elevated R. R. Co.*, 43 N. Y. Superior Ct. 478, where it was held that a corporation may loan money to aid in a work *auxiliary* to its main business, and is not liable for its misappropriation. But the general rule is that one corporation cannot without express power lend its credit to another. *Central Bank v. Empire Stone Dressing Co.*, 26 Barb.

(N. Y.), 23; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 id. 421; *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144; *Smead v. Indianapolis, &c. R. R. Co.*, 11 Ind. 104; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309, 19 id. 312; *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Sumner v. Marcy*, 3 W. & M. (U. S. C. C.) 105, as such an act would not only be entirely contrary to the objects of the incorporation, but is a power so dangerous to the interests of the stockholders that it is treated as withheld unless expressly conferred.

Strictly speaking, the term should be applied only to *such acts of a corporation as it is beyond the powers of the corporation to do, under either the express or implied authority conferred by the statute creating it.*<sup>1</sup> Acts done by it which are expressly prohibited by

<sup>1</sup> DeGraff v. American, &c. Co., 21 N. Y. 127. In *Parish v. Wheeler*, 22 id. 503, COMSTOCK, C. J., says, in relation to this question: "There is certainly no moral turpitude if a railroad corporation buys a steamboat or builds a church, nor is there any legal turpitude. It may be an excess of power, or a private breach of trust in respect to its stockholders. The latter may complain or the State may interpose, but corporations themselves, like individuals, in dealing with other parties, must live up to the rules of common honesty." In *Bissell v. Michigan, &c. R. R. Co.*, 22 N. Y. 258, COMSTOCK, C. J., said: "But the doctrine that corporations can never be bound by engagements not justified by the grant of power from the State, is next defended on a different ground. Although it be conceded that they are present, and acting as legal persons or entities when such engagements are entered into, it is said that all contracts in excess of the rightful power possessed by corporations are illegal and therefore void. This is an argument totally different from the one which has been so far examined, because it necessarily imputes the making of the contract to the corporate person or being; whereas, the doctrine which I have endeavored to refute denies that proposition. The very point of the supposed illegality consists, or at least it may consist, in the performance of acts perfectly lawful in themselves, but which being done by a corporation, and not by individuals, are pronounced illegal because they are so done without authority contained in the charter. . . . To illustrate the subject: An agent may make a contract in the name and behalf of his principal, but not within the scope of his agency. If the consideration and purpose of such a contract be lawful, it may be void as against the principal, but not on the ground of illegality. A corporation is not an agent of the State, or, in any strict sense, of the shareholders. But it derives its powers from the State, and it may transcend

those powers for purposes which, in themselves considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal, because they violate no public interest or policy. My meaning, in short, is that the *illegality* of an act is determined in its quality and does not depend on the person or being which performs it. There has been, I think, some want of reflection, even in judicial minds, upon the reasons and policy which mainly govern in the granting of charters to corporations, with certain specified powers and no others. A private or trading corporation is essentially a chartered partnership, with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy. It is also something more than a partnership, because the legal or artificial person becomes vested with the title to all the estate and capital contributed, to be held and used, however, in trust for the shareholders. Now, in a well-regulated unincorporated partnership, the articles entered into by the associates specify the objects of their association. But suppose the same associates desire a charter of incorporation for the more convenient prosecution of the same business, and obtain one. We shall find it to contain the like specification, which becomes the grant of power from the sovereign authority of the State. I am speaking of powers and privileges granted which are not in their essential nature corporate or public franchises, as distinguished from the private enterprises which any class of citizens may embark in; and, with the exception of municipal or governmental charters, the class of powers here referred to will be found to cover nearly the whole field of corporate rights. It is not difficult, then, to see the reason and policy which underlie such grants. The associates ask for a charter in order to carry on their business



statute, or which are opposed to public policy, are simply illegal acts, in respect to which a corporation stands upon precisely the

with greater advantages; and the same reason exists for a specification of the purposes of their organization as in the case of an association without a charter. The charter takes the place of the articles of agreement, and becomes the appropriate rule of action. No public interest or policy is involved, because the objects of the grant are not of a public nature. The powers and rights specified are identical with those which any private person or association of persons may exercise. If those who manage the concerns of a simple partnership deal with the funds in a manner or for purposes not specified, their acts are *ultra vires*; and if the directors of such a corporation as I am here speaking of do the same thing, their acts are also *ultra vires*, in the same sense and no other. To apply the word 'illegality' to such transactions is to confound things of a totally different nature. It is only private interests which are affected by them; and there is no statute or rule of the common law by which they become public offences. In every treatise upon the law of contracts — and there are many of them — we shall find an enumeration of such as are immoral or illegal; but amongst them cannot be found a specification of the promise or agreement of a corporation, founded on a lawful consideration, to do that which in itself is lawful to be done, although not within the powers granted. It has always been supposed, and to that effect are all the authorities, that contracts are illegal either in respect to the consideration or the promise. Where both of these are lawful and right, the maxim *ex turpi contractu non oritur actio* can have no application. The incapacity of the contracting party, whether it be a corporation, an infant, a *feme covert*, or a lunatic, has nothing to do with the legality of the contract, in that sense of the word which is now under discussion. So, in the treatises upon corporations, we shall find their rights and privileges to be very extensively considered, but nowhere an intimation that their dealings outside of their charters are deemed illegal for that cause. Even the proceeding against them by *quo warranto*,

for the exercise of ungranted powers, will illustrate the subject. This is a civil, and not a criminal proceeding, and its object is purely and solely to try a civil right. 2 Kyd on Corporations, 439; Angell & Ames, 686; 1 Serg. & Rawle, 385; 3 Dallas, 490; 1 Blackf. 267. Our statute on this subject makes it the duty of the attorney-general to institute the proceeding, under leave of the court, when the case is one of public interest, but, in other cases, only at the instance of private parties claiming to be aggrieved by the abuse of power, and on security being given to indemnify the State. 2 R. S. 583, §§ 39, 40. In any case, whether the suit be founded on the alleged usurpation of a public or corporate office, or on the nonuser or misuser of the franchises granted to a corporation, it is purely a civil right which is tried, and the judgment is not penal, but simply one of ouster from the right claimed. The legislature may, and sometimes does, expressly prohibit the doing of certain acts by corporations, having in view the promotion of some particular policy of the State, and may declare such acts to be public offences, to be punished by fine or imprisonment of the parties engaged in them. There are such laws in regard to incorporated as well as private banks, the object of which is to protect the currency of the State. But where there are no such penalties or prohibitions, and the dealings of a corporation have no relation to State policy, but are such as all mankind may freely engage in, the law has provided no punishment for such dealings, because it does not regard them as a violation of its principles and enactments in any sense which is material to the present inquiry. I do not deny that there is, in a different sense, a legal wrong in the misapplication of the corporate capital and funds; and so there is in every breach of trust or violation of contract. But the true inquiry here is, whether it belongs to the class of public, as distinguished from private wrongs, so that the guilty party may set it up in avoidance of just obligations; and whether the court must under all circumstances accept that defence without reference to the situation

same footing as an individual, and are absolutely and irretrievably void.

As to *ultra vires* acts of a corporation, in the sense in which we employ the term, they stand upon the same footing as the acts of an agent done in excess of his authority; they are not obligatory or binding, in the first instance, but may become so if ratified and adopted by the parties to be affected thereby. It is erroneous to say that acts which are only strictly *ultra vires* are illegal, because if that were so they are *malum in se*, and absolutely void in every case and under all circumstances; whereas it is held by many respectable authorities in this country, that unless the act involves a public wrong (*and therefore is illegal*), it may be so acquiesced in by the stockholders as to become valid and enforceable against the corporation.<sup>1</sup> Thus, in a recent case in the United States Supreme Court, the charter of a financial corporation provided that "the business of the corporation shall be managed and directed by the board of trustees, who shall elect from their number a president and two vice-presidents, and may appoint such other officers as they may see fit; nine of the trustees, of whom the president or one of the vice-presidents shall be one, shall form a quorum for the transaction of business at any regular or adjourned meeting of the board of trustees; and the affirmative vote of at least seven members of the board shall be requisite in making any order for, or authorizing the investment of any moneys, or the sale or transfer of any stock or securities belonging to the corporation, or the appointment of any officer receiving any salary therefrom." On the 18th of September, 1873, the board of trustees authorized and empowered the officers of the company to assign and transfer any of the regular stock of the United States standing in its name. On the 13th of December in that year, the same board directed the finance committee to authorize those officers to negotiate the securities of the company in such manner as to relieve the company from its embarrassment. During November or December the company borrowed from L. \$10,000, giving him its note for that amount and, as collateral, certain securities held by the company. The company was then embarrassed for money, and used the money borrowed to pay off its obligations. In 1874 the duly authorized agent of the company agreed with L.

and rights of the other party. I cannot believe such to be the rule of reason or of law." Co., 23 How. (U. S.) 381; *Cazart v. Georgia, &c. R. R. Co.*, 54 Ga. 370; *Hazelhurst v. Savannah, &c. R. R. Co.*,

<sup>1</sup> *Zabriskie v. Cleveland, &c. R. R.* 43 Ga. 13.

that L. should lend the agent \$21,000, including the note of the company for \$10,000, and that the agent should procure the transfer by the company of certain obligations held by it including certain notes. This was done. *There was no formal order by the board of trustees, as required by the charter, touching either of the transactions with L., but they were communicated, as were all others, daily to the individual members of the board. There was no proof that any objection was ever made. It was held that an action by the trustees in bankruptcy of the corporation to compel the delivery of the notes delivered by the agent to L. could not be maintained. Said the court: "It would be a perversion of the plainest principles of reason and justice to permit the validity of such a security to be effectually denied.<sup>1</sup> It cannot be done. Courts do not look at such transactions with the microscopic eyes of a special demurrer. This intelligent acquiescence was a binding ratification.<sup>2</sup>"* The right of

<sup>1</sup> De Graff v. American Lin. Co., 21 N. Y. 128; Parish v. Wheeler, 22 id. 503; Bradley v. Ballard, 55 Ill. 413; McCutchin v. Collins, 13 Penn. St. 15.

<sup>2</sup> Kelsey v. National Bank, 69 Penn. St. 426; Hilliard v. Goold, 34 N. H. 230; Christian University v. Jordan, 29 Mo. 68; Sherman v. Fitch, 98 Mass. 59; Creswell v. Lanahan, 101 U. S. 347. The effect of acquiescence to give validity to an act of incorporation in excess of its power is illustrated in Kent v. Quicksilver Mining Co., 12 Hun (N. Y.), 53. In that case, at a stockholders' meeting, by a majority vote, the corporation voted to issue preferred stock in lieu of common stock. There was no statutory authority for the issue of such preferred stock. The plaintiff was not present at the meeting at which the vote was taken, and had never in any manner acquiesced in the act. It was held that he was entitled to an injunction to prevent the further issue of preferred shares; but that those stockholders who had consented to the issue of preferred shares were precluded from objecting thereto. DANIELS, J., said: "*Prima facie*, all the shareholders in a company are entitled to share profits *pari passu* in proportion to the number of shares they respectively hold; and a resolution by a majority that dividends shall be paid to some of the shareholders in preference to, or to the

exclusion of, the others, is clearly illegal, unless it is warranted by something more than the will of those who make it. *Id.*; Lindley on Part., 2d ed., 780; Adley v. Whitstable Co., 17 Ves. 316; Scarborough Hotel Co., 2 D. & S. 514. It has been supposed that a different principle was held to be the law in the case of *Hazelhurst v. Savannah R. R. Co.*, 43 Ga. 53, and an intimation to that effect was very plainly expressed in the opinion of the court; but its effect as authority was entirely counteracted by the preceding remark that the learned judge who delivered the opinion deemed it proper to make, that the court did not feel called upon to decide this question. The case of *Evansville, &c. Railway v. Evansville*, 15 Ind. 395, simply included the determination that a railroad company, under the peculiar circumstances there shown, could agree to allow interest on its stock taken for bonds by a city until the railroad should be made complete and ready for operation. In *Bates v. Androscoggin Railway*, 49 Me. 491, the proposition to issue preferred stock is stated to have been first presented to, ratified and adopted by, the stockholders of the company at a meeting held on the 21st of August, 1849. *Id.* 502. And in *Henry v. Great Northern Railway Co.*, 1 De Gex & Jones, 606; *London India Rubber Co.*, Law Rep. 5 Eq. 518; *Matter of Bangor*, id. 20 Eq.

recovery in cases where the undertaking is not strictly within the corporate powers rests upon the unanimous consent and approval

59, the authority to issue preference shares was secured by act of Parliament; and in *Prouty v. Michigan Southern, &c. R. R. Co.*, 1 Hun (N. Y.), 655, by the statutes of the States permitting the consolidation. . . . The shareholders who consented that the preferred shares might be issued sustain a different relation to such shares; and as the charter itself did not prohibit their creation, but the company was only restrained from doing so by the obligations it had assumed by the certificates of stock it had issued, they should be precluded by their own conduct from denying their binding validity; for under the terms of its charter the company appears to have had the power to have provided by its by-laws for the issuing of preferred shares. In that respect it differed from the authority possessed by the defendant in the ably contested case of *Richie v. The Ashbury Co.*, Law Rep. 7 Ir. App. 653, where the power exercised was expressly prohibited. In the present case the company had simply deprived itself of the right by the form in which its shares had been originally issued. It was a restraint voluntarily assumed in favor of the owners of its stock, which they could yield and surrender again to the company. And those who, by their votes or otherwise, authorized or sanctioned the acts of the company in the creation of the preferred shares must have intended to, and did, make that surrender. That was the understanding on which the case of *Bates v. Androscooggin, &c. R. R. Co.* (*ante*) was decided, and other authorities have proceeded upon the same principle. *London Building Society*, 21 L. T. (N. s.) 8. Those parties concurred with the officers in procuring the advance made upon the faith and consideration of the preference shares, and upon plain principles of equity should not, under the circumstances, after that be heard to dispute their validity. But as the plaintiff was not one of those persons, and was not shown to have received but a small portion of his common stock from or under either of them, he cannot, as to the residue, justly be estopped in this manner. For neither he nor they, in any

form, induced the persons who exchanged their shares to part with their money, on the expectation that the interest proposed should afterwards be paid to them for doing that. It has also been urged in the plaintiffs' behalf that by closing the books the directors terminated the authority given by the assenting shareholders to issue preferred stock. And such seems to have been the understanding of the parties at the time when the preferred shares were issued, for the certificates contained the statement that 'this preferred stock is entitled to interest on the first day of May, 1871, and annually thereafter to be paid out of the net earnings of the company for each year, at the rate of seven per cent per annum, provided so much in the year preceding shall have been earned. Should there remain a surplus of earnings after the payment of the said interest upon the preferred stock, then this surplus shall be divided among the holders of the preferred and common stock.' The agreement has been plainly stated here, that the existing preferred and common stock shall alone share in the surplus after paying the interest on the preferred shares issued under the resolution of 1870. And that could not be done if the residue of the common can itself still be changed into preferred shares; for a portion of the earnings in that event will be applied to pay the interest on the newly preferred shares, which otherwise would be applied by way of dividends on those which have already acquired this preference. And that would be a violation of the agreement stated in the preference certificates. If they were lawfully issued, and they certainly were, so far as they had the assent or approval of the owners of the common shares; it consequently follows that the earnings agreed to be appropriated to them by way of dividends cannot, without the consent of the owners of them, be withdrawn from them and applied by way of interest on other shares afterwards in form promoted to a similar preference. *McLaughlin v. Detroit R. R. Co.*, 8 Mich. 100. The judgment re-

of the stockholders. But in case this is not expressly given, it would probably be presumed from an acceptance of the fruits and profits of an enterprise thus entered upon *ultra vires*, and of the benefits and consideration of a contract made by the corporation in the prosecution of such enterprise.<sup>1</sup> This would, undoubtedly, be a

covered in the case restrained the company from creating other preferred shares, and from paying any of its earnings on any newly issued preferred shares, while the plaintiff continued to be the owner of common and preferred shares of its stock. No direction was given as to how the fund held as its net earnings should be distributed, and no such direction is required for the purpose of fully disposing of the appeal taken in this case. As far as the judgment extended, it was clearly correct, and it should, therefore, be affirmed, with costs." The doctrine of *ultra vires* has no application in favor of corporations for wrongs committed by them. *Carlisle Bank v. Graham*, 100 U. S. 699. So, where a corporation organized pursuant to the provisions of a statute, but before its articles of association were filed with the county clerk entered into a contract for certain machinery to enable it to carry on its business, it was held that its subsequent recognition of the validity of the contract was binding upon it, although the statute declares that a corporation so organized shall not commence business before such articles are so filed. *Whitney v. Wyman*, 101 U. S. 392. A corporation, like a natural person, may be compelled to account for benefits received from a transaction, even if it be one not enforceable by reason of the fact that its agents had no right to make it, it being neither illegal nor immoral. *Manville v. Belden Mining Co.*, 17 Fed. Rep. 425. The Hartford, Providence, & Fishkill R. R. Co., a Rhode Island corporation, in 1863 executed an agreement transferring all its property, *in perpetuum*, to the Boston, Hartford, & Erie R. R. Co., the stockholders of the former company to be remunerated by stock in the latter, or by payment of a fixed price per share. The latter company afterwards mortgaged its road, became bankrupt, and was dissolved by a Connecticut decree. The mortgagees afterwards foreclosed in Rhode

Island, and formed the New York & New England R. R. Co. The road and property passed into the possession of this latter company by deeds from the mortgage trustees, and from the assignees of the bankrupt company. In 1875 certain stockholders of the H. P. & F. R. R. Co. brought a suit in equity in Rhode Island to set aside the agreement and lease. It was held that the agreement and lease were *ultra vires*, but that plaintiffs, by *laches*, and by the intervention of other equities, were precluded from relief. *Boston & Prov. R. R. Co. v. New York & N. E. R. R. Co.*, 13 R. I. 260.

<sup>1</sup> The presumption against corporations, on the ground of acquiescence or implied ratification, is illustrated by the case of *Zabriskie v. Cleveland, Columbus & Cincinnati Railway*, 23 How. (U. S.) 381, where the facts were as follows: By the general railway law in Ohio, one railway company was allowed to aid in the construction of other lines, by subscriptions to the capital stock of the companies, provided that in a meeting of the stockholders, called for that purpose, two-thirds of the stock represented should assent thereto. And by a subsequent act, it was provided that any existing company might accept this provision, and by filing a certificate of such acceptance with the Secretary of State, make it a part of its charter. In this case the defendants, without having complied with either of the foregoing conditions, made a guaranty of \$400,000 of the bonds of the Columbus, Piqua, & Indiana Railway. A bill was brought by the plaintiff, a member of defendants' company, to restrain them from paying the interest on the bonds so guaranteed by them, upon the ground that the defendants' directors had exceeded their authority in making the guaranty. Some of the other stockholders, by permission of the court below, became defendants in the suit. The court held, that, as between the parties to the present

ratification of the contract by them. But if a corporation, by itself or its agents, engages in such an enterprise, and in the usual way issues its obligations, would the failure of a member to give his express or implied assent thereto enable him or the corporation to make *ultra vires* a defence to such an obligation, the consideration of which has been received and appropriated by the corporation, for a purpose foreign to the original objects and purposes of its creation? If, as has been suggested, the contract has been executed and the corporation has received the consideration of the same, and more especially if the stockholder has, with a knowledge of the transaction, acquiesced therein, and received his share of the dividends and profits of the enterprise, this would, undoubtedly, conclude him and the corporation from a defence on the ground of *ultra vires*. But a member, under other circumstances, has an unquestioned right to restrain the execution of an undertaking, or a contract clearly *ultra vires*.<sup>1</sup>

suit, the acceptance of the provisions of the general railway law, and of the subsequent statute, might be presumed from the conduct of the corporators, in not sooner taking steps to nullify the action of the directors in making the guaranty; and that it was not competent for the corporation, after having made such guaranty, received the benefits of it, and allowed the bonds to go into general circulation on the faith of its responsibility, now to repudiate them upon the ground of their own omission to comply with the requirements of the statute. And especially were the bonds binding upon the defendants, since the guaranty by the directors had been expressly ratified by a resolution of the stockholders at a meeting held subsequently, and at this meeting the plaintiff's stock was represented. In *Bargate v. Shortridge*, 5 H. L. C. 297, Lord St. LEONARDS said: "It does appear to me that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn round, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have in-

quired and ascertained the matter. . . . The way, therefore, in which I propose to put it to your lordships, in point of law, is this: The question is not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law, but the question simply is, whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do."

<sup>1</sup> It may be the duty of the member, under such circumstances, to restrain the unlawful act in such cases, which he may do by injunction; and in the absence of such proceeding, be estopped from insisting upon the defence of *ultra vires*, as he might be presumed to acquiesce in the execution of contracts to which he expressed no dissent, if executed in the usual manner. The power of a court of equity to restrain a corporation from doing acts which are in excess of its powers is well settled; but in order to warrant the interference, there must be a gross abuse of its powers, or acts clearly in excess thereof, which will result injuriously to the complainant. *Jones v. Mayor, &c. of Little*

In a New York case,<sup>1</sup> COMSTOCK, J., in our judgment successfully combats the doctrine that all *ultra vires* acts are illegal. He says: "If an enterprise is successful, the corporation and its stockholders gain by the result. If a depression occurs in the market, and disaster is threatened, the doctrine that a corporation can never act outside of its charter enables it to say, 'This is not our dealing;' and the money used in the dealing may be unconditionally reclaimed from whatever parties have received it for value; while the injured dealer must seek his remedy against agents, perhaps irresponsible or unknown. Corporations may thus (if the doctrine of *ultra vires* in such cases is adopted) take all the chances of gain, without incurring the hazard of loss. Familiar maxims of the law must be reversed. In the relation of private principal and agent, the adoption of the agent's unauthorized dealings is equivalent to an original authority; and the adoption is perfect when the principal receives the proceeds of that dealing. Corporations may practically act in the same manner. . . . But is it true that all contracts for purposes not embraced in their charters are illegal, in the appropriate sense of the term? This proposition I must deny. Undoubtedly, such engagements may have vices, which sometimes infect the contracts of individuals. They may involve a *malum in se*, or a *malum prohibitum*, and may be void for any cause which would avoid the contract of a natural person. But where no such vices exist, and the only defect is one of power, the contract cannot be void because it is illegal or immoral. Such a doctrine may have some slight foundation in the earlier English railway cases,<sup>2</sup> but it was never established, and is not now received in the English courts.<sup>3</sup>

"The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but with the slight exception named, there is not only an entire absence of adjudged cases, even of judicial opinion or *dicta*, for the proposition that mere want of authority renders a

Rock, 25 Ark. 301; Lane v. Schomp, 20 N. J. Eq. 82; Union Pacific, &c. R. R. Co. v. Lincoln County, 3 Dill. (U. S. C. C.) 300; St. Louis v. Weber, 44 Mo. 547; Robinson v. Chartered Bank, L. R. 1 Eq. 32; Bach v. Pacific Mail Steamship Co., 12 Abb. Pr. (N. Y.) n. s. 373.

<sup>1</sup> Bissell v. Michigan, &c. R. R. Co., 22 N. Y. 264.

<sup>2</sup> The East Anglian Ry. Co. v. The Eastern Counties Ry. Co., 11 C. B. 775; Macgregor v. Dover, &c. R. R. Co., 18 Q. B. 618.

<sup>3</sup> The Mayor, &c. v. The Norfolk Ry. Co.; Eastern Counties Ry. Co. v. Hawkes.

contract illegal. Such a proposition seems to me absurd. The words '*ultra vires*,' and '*illegality*,' represent totally different and distinct ideas. It is true that a contract may have both these defects, but it may have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription made by authority of the board of directors and under the corporate seal, for the building of a church or college, or an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated. So, a manufacturing corporation may purchase ground for a school-house or a place of worship, for the intellectual, religious, and moral improvement of its operatives. It may buy tracts and books of instruction for distribution among them. Such dealings are outside of the charter; but so far from being illegal and wrong, they are, in themselves, benevolent and praiseworthy. So, a church corporation may deal in exchange. This, though *ultra vires*, is not illegal, because dealing in exchange is not itself an unlawful act."<sup>1</sup> It is evident that by the plainest

<sup>1</sup> In *Bissell v. Michigan, &c. R. R. Co.*, *ante*, SELDEN, J., said: "There are, no doubt, cases in which a corporation would be estopped from setting up the defence, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bond fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable, not only in the hands of the original payee, but in those of any subsequent holder, because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing

with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed. A question analogous to this arises, where public officers who have done something in contravention of the statute under which they act are afterward sought to be estopped from setting up that their act was unauthorized. It was insisted by counsel in the case of *Regina v. White*, 4 Ad. & El. (N. S.) 101, that for public reasons officers so situated were not estopped; but Lord DENMAN said: 'We have held that this is true only of a stat-



principles of justice, corporations making contracts in such cases, and receiving the consideration and the full benefits of the same,

ute the contents of which are publicly known; such a statute is to have effect whatever dealings may take place; but when the persons acting, whether trustees for public purposes or not, have done any act which was not known to the parties with whom they were afterward dealing, such an act cannot prevent the estoppel arising from that subsequent dealing.' This doctrine, which was also held in the case of *Doe, ex dem. Levy v. Horne*, 3 Ad. & El. (N. S.) 757, will be found, when carefully examined, to sustain the exception which I have suggested in the case of corporations. But aside from these exceptional cases, it is, in my judgment, not only entirely clear upon principle, but abundantly settled by authority, that the contract of a corporation, if unauthorized by its charter, is an illegal contract, and that the corporation is not estopped from setting up this illegality in defence to an action brought upon it. In referring to the cases which support these views, I will notice the English cases first. There are three classes of cases in England in which the question of *ultra vires* arises, namely: first, cases in which one or more of the shareholders seek to restrain the officers of the corporation from engaging in transactions unauthorized by the charter; second, actions brought by third persons against corporations to enforce their contracts, in which the defence relied upon is, that in making the contract the corporation exceeded its corporate powers; and third, similar actions, in which the defence is that the directors had exceeded, not the powers conferred upon the entire corporation by law, but those conferred by the shareholders upon the directors or managing officers by deed. These three classes of cases differ materially in their nature and principles, and if we would avoid confusion must be kept entirely distinct in investigating the subject. Those of the third class have no bearing upon the question we are discussing. There is in England a class of corporations organized under general laws, which do not specify the manner in which the objects and purposes of the incorpora-

tion are to be effected, but leave this to be arranged by a 'deed of settlement' between the corporators themselves. By this deed the companies prescribe and limit the powers and functions of their various officers, so far as they are left uncontrolled by the statute and the general laws of the kingdom. Now, it is plain that there is no analogy between an act which merely transcends the limits of this deed of settlement and one which violates the provisions of the organic act. The deed of settlement is the private act of the shareholders, and its provisions have respect solely to their private interests. It is a mere power of attorney, and bears no resemblance to a law enacted with a view to the interests of the public. There is evidently no question of public policy involved, when the question is, whether the officers have exceeded the authority conferred by this deed. The case of the *Royal British Bank v. Turquand*, 5 El. & Bl. 248, is one of this class of cases. By comparing the language of Lord CAMPBELL in this case with that used by him upon another occasion, we shall obtain a clear view of the distinction here adverted to. In the case cited, the action was upon a bond signed by two of the directors, and the question was, not whether the giving of the bond exceeded the powers which the corporation itself had a right to assume, but whether it was authorized as between the shareholders and the directors by the deed of settlement. Lord CAMPBELL, in delivering his opinion, said: 'A mere excess of authority by the directors, we think, would not amount to a defence.' Of course, by this was meant merely an excess of authority by the directors as the agents of the stockholders, and not an unauthorized assumption of power as between the corporation and the public. In the *Mayor of Norwich v. The Norfolk Railroad Company*, 30 Eng. Law & Eq. 120, the same learned judge fully recognizes the distinction I take, and shows that by the remark just quoted he by no means meant to say that corporations were bound by contracts which are *ultra vires*, as between them and the pub-

should not be allowed to defeat the obligations made by them therefor; or, at least, should not be permitted with impunity to appropriate the property of another, received by virtue of such a contract, and, under a plea of *ultra vires*, defeat any recovery therefor.

**SEC. 172. Defence not Admitted, when the Contract is Executed.**

— Contracts made with corporations in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, will not be enforced; because such contracts contemplate an unauthorized diversion of corporate funds, and therefore a breach of private trust. But executed dealings of corporations are allowed to stand for and against both parties, where the plainest rules of good faith so require, even though prohibited by statute; and no action for its enforcement could be maintained. In such cases the doctrine of estoppel is applied, and a party is not permitted to set up his want of capacity.<sup>1</sup> In the case last cited, BACON, J., said: "If it be conceded that the defendants had no power to enter into the contract of sale in this case, and bind the company to perform the obligations assumed, viewed as a mere question of corporate power, yet, having undertaken to do so, and having received the full consideration agreed to be paid by the plaintiff, and he having fulfilled his entire contract, they cannot now be permitted to set up that excess of authority to excuse them from that part of the contract which imposes an obligation upon them. This principle has been repeatedly held as applicable to an individual attempting to screen himself from liability when contracting with a corporation, as in the case of a corporation when seeking to escape responsibility on the plea of

lic. He then said: 'The mere circumstance of a covenant by the directors in the name of the company being *ultra vires* as between them and the *shareholders* does not necessarily disentitle the covenantee to sue upon it. . . . But suppose that the directors of a railway company should purchase a thousand gross of green spectacles as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; . . . this would be an *illegal* contract to misapply the funds of the company, and the illegality might be set up as a defence.' The phrase '*ultra*

*vires*' is applied in the English cases both to acts which simply exceed the powers conferred by the deed of settlement upon the officers as the agents of the shareholders, and acts which transcend the powers conferred by law upon the entire corporation. This indiscriminate use of the phrase is calculated to mislead, unless the distinction referred to is observed. It is evident that the class of cases to which that of *Royal British Bank v. Turquand* belongs have no bearing upon the question under consideration, and hence they will be no further noticed."

<sup>1</sup> *De Graff v. American, &c. Co.*, 21 N. Y. 124.

*ultra vires* for acts deliberately done with all the usual and needful formalities, and where they have received the entire benefit they contracted for. Such a defence should no longer be tolerated in our courts. Where the question is merely as to the power to contract, a party who has had the benefit of the contract should not be permitted — especially where there is no unlawful intent charged upon the other party, and he is in no sense *in pari delicto* — to question its validity. To deny relief to a plaintiff thus situated would be substantially to secure to the party deliberately violating one of the laws of its existence, and when no guilty complicity can be charged upon the other party, the fruits of an illegal transaction, and operate as a premium upon repudiation and fraud.”<sup>1</sup>

<sup>1</sup> *Chicago Building Soc’y v. Crowell*, 65 Ill. 458; *Tracy v. Talmadge*, 14 N. Y. 162; *National Bank v. Matthews*, 98 U. S. 621; *Herzo v. San Francisco*, 33 Cal. 134; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Bissell v. Michigan, &c. R. R. Co.*, *ante*. In *Parish v. Wheeler*, 22 N. Y. 494, *COMSTOCK, J.*, says: “The most favorable statement of the particular matter now in question is, that the railroad corporation, in excess of the powers conferred upon it by its charter, purchased and paid for a steamboat and several canal boats; that being in possession and use of the property, in connection with its regular business, it mortgaged the same property to its creditors, the plaintiff, taking back charter-parties for a limited period, and also a stipulation for a reconveyance, if the debt should not be paid at the time agreed on; that the plaintiff, taking the usual course in such cases, caused a part of the property to be sold after a default had occurred, and received the proceeds of that sale, which nearly or quite satisfied the debt. In all this I can see nothing unlawful except the want of legal power or right to buy the property. But it was actually bought, paid for, and delivered, and, therefore, become a part of the estate and assets of the company. The company could sell or pledge it to a creditor, and could redeem the pledge by paying the debt. In acquiring the ownership of such property, the corporation may have usurped a right not granted by its charter. But the acquisition was, nevertheless, a fact which no legal re-

finement can deny; it was a fact too, having all the legal relations and incidents of any other fact of ownership. I think it will not be questioned, that an execution creditor of the company could levy on this property and sell it for the satisfaction of its debt; and having thus obtained a satisfaction, I do not think that he could deny that he was paid, upon any theory of excess of corporate power, and levy again upon other property. So, if the creditor, instead of proceeding to judgment and execution for his debt, takes a pledge or mortgage, and by the exercise of the power of sale, obtains the cash for his demand, I do not see how he can raise the inquiry whether the corporation debtor violated the trust duty, which it owed to its shareholders in the purchase of the chattels pledged or mortgaged. So long as no one else questions the title thus acquired, and the property is made productive in the satisfaction of the debts, it would be strange if the creditor can, upon such ground, claim that the debt still exists. And such is, in effect, this case. The security of the plaintiff, as I have said, was in the nature of a mortgage. The stipulation to reconvey on payment of his claims provided for nothing beyond the legal result of the transaction. The reconveyance, it is true, was to be made to the appointee of the corporation; but that clause considered by itself involved nothing illegal, or even *ultra vires*. The plaintiff actually sold a part of the property for the payment of his debt, and he received the money. No one but himself

A corporation will be estopped to deny that its mortgage for money borrowed was within the corporate power, where the trans-

questions, or can question, his right to make the security available in that manner. He does not pretend or suggest that he cannot hold the money thus obtained. On the contrary, he insists upon retaining it against all the world; but at the same time claims that his debt is neither paid nor reduced. Much has been said in the books (sometimes I think without reflection) about the powers of corporations and the consequences of exceeding those powers. But no authority can be found to justify the position of the plaintiff in respect to the matter here considered." *Hazelhurst v. Savannah, &c. R. R. Co.*, 43 Ga. 54; *Bradley v. Ballard*, 55 Ill. 413; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Hitchcock v. Galveston*, 96 U. S. 341; *North Western Union Packet Co. v. Shaw*, 37 Wis. 655; *Argenti v. San Francisco*, 16 Cal. 255; *Rutland, &c. R. R. Co. v. Proctor*, 29 Vt. 93; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Morville v. Am. Tract Society*, 123 Mass. 129. The doctrine of *ultra vires* will be applied to such contracts only as remain wholly executory. *Thompson v. Lambert*, 44 Iowa, 239. Where a corporation receives money upon the faith of its act, and uses the same, and the contract has been fully performed, it, or one succeeding to its rights, cannot plead a want of authority to do the act by which the money is obtained. *Darst v. Gale*, 83 Ill. 136. A corporation which has bought land by a deed which reserves a lien for the price, and taken possession, will not be heard to defend a proceeding to enforce the lien, on the ground that it had not corporate power to contract for payment in money but only in corporate warrants, unless it offers to surrender the land. *Natchez v. Mallery*, 54 Miss. 499. Where a corporation has entered into a contract which has been fully executed on one part, and nothing remains but for it to pay the consideration money, it will not be allowed to set up that the contract was *ultra vires*. *Oil Creek, &c. R. R. Co., v. Pennsylvania Trans. Co.*, 83 Penn. St. 160. The statute prohibiting savings banks from loaning money on the security of

names alone is directory to the trustees, and designed for the protection of the depositors, and will not prevent a bank from enforcing payment of a promissory note, whether the purchase was or was not in conformity with its provisions. *Farmington Savings Bank v. Fall*, 71 Me. 49. So a corporation which has discounted commercial paper without any statutory power to do so may recover the money thus loaned, although the securities are void. *Pratt v. Short*, 79 N. Y. 437; 35 Am. Rep. 531. Where the payment of bonds issued by one company is guaranteed by another company, and the guaranty is partly performed, the former company cannot avoid a mortgage executed to indemnify the latter, on the ground that the guaranty was *ultra vires*, at least so far as the actual payments are concerned. *Macon & Augusta R. R. Co. v. Georgia R. R. Co.*, 63 Ga. 103. It does not follow that because a purchase of property is *ultra vires* the title remains vested in the seller so that it can be seized for his debts. *Edwards v. Fairbanks*, 27 La. An. 449. Although an insurance company exceeded its charter powers by loaning money for two years instead of one, and in taking a note and mortgage therefor, instead of a bond and mortgage, yet the contract not being immoral, nor against public policy, and no penalty being attached to it, — it was held that it might maintain an action upon the securities given for the loan. *German-town, &c. Ins. Co. v. Dhein*, 43 Wis. 420; *Bradley v. Ballard*, 55 Ill. 413; *German National Bank v. Meadowcroft*, 95 Ill. 124; *State Board v. Citizens', &c. R. R. Co.*, 47 Ind. 407; *Steam Nav. Co. v. Weed*, 17 Barb. (N. Y.) 878; *National Bank v. Rogers*, 125 Mass. 339; *Ossipee, &c. Co. v. Canney*, 54 N. H. 295; *Paul v. Kenosha*, 22 Wis. 266; *Hay v. Gallion Gas Light, &c. Co.*, 29 Ohio St. 330; *Thomas v. Richmond*, 12 Wall. (U. S.) 349; *National Pemberton Bank v. Porter*, 125 Mass. 333; *Franklin Co. v. Lewiston Savings Bank*, 68 Me. 43; *Caldwell v. Mohawk Valley Bank*, 64 Barb. (N. Y.) 443; *Dill v. Wareham*, 7 Met. (Mass.) 438. So it is held that although a con-

action, though not within any powers expressly granted, was an exercise of power germane and incidental to those powers, and was in furtherance of the objects of the corporation, and not inconsistent with the public interest.<sup>1</sup>

tract may be *ultra vires*, if it has been executed in whole or in part, neither party to it will be permitted to rescind it of his own motion, and to recover, without process of law, and by force, the consideration paid or property acquired under the contract; and in such case a corporation that has received a large consideration for a contract *ultra vires* for the sale of a telegraph franchise will be restrained from resuming possession of said franchise and the property connected therewith, until an accounting and settlement can be had between the parties. *American Union Telegraph Co. v. Union Pacific R. R. Co.*, 1 McCrary (U. S. C. C.), 188. The Union Pacific Railroad Company, authorized by acts of Congress to construct a railroad and telegraph line, is without the power to lease its right to construct, maintain, and operate a line of telegraph, although it be stipulated in the contract that the lessee shall perform all duties imposed upon the railroad company by its charter. *Atlantic & Pacific Telegraph Co. v. Union Pacific R.R. Co.*, 1 McCrary (U. S. C. C.), 541. Although a contract may have been *ultra vires*, a court of equity will restrain a corporation from recovering possession of property which has passed thereunder, until after due process of law, and a return of the consideration paid.

<sup>1</sup> *West v. Madison Co. Agric. Board*, 82 Ill. 205. It is now the generally accepted rule that a mere excess of power will not invalidate a contract, if it has been executed. Thus, although a loan made by a corporation is in excess of a limit imposed by statute, and not enforceable because *ultra vires*, yet, if the contract has been executed by the parties, a court of equity will not interpose, at the suit of a creditor of the borrower, to cancel the transaction, and compel a return of the securities, but will leave the parties where it finds them. *Stewart v. National Union Bank*, 2 Abb. (U. S.) 424. So, one who has sold and conveyed land to a corporation, or has bought land from a corpo-

ration, cannot raise the objection against the company, that its purchase or sale of the land was beyond its powers, until the sovereign power has established this in some direct proceeding to impeach the purchase. It cannot be questioned collaterally. *Smith v. Sheeley*, 12 Wall. (U. S.) 358; *S. P. Shewalter v. Pirner*, 55 Mo. 218; *Kelly v. People's Transp. Co.*, 3 Or. 189. So, where creditors of the seller sought to maintain their right to seize the property for his debts, on the ground that the corporation had not power to buy it, and therefore the seller's title was never divested. *Edwards v. Fairbanks*, 27 La. An. 449. And as to a person sued for having done wilful injury to property of a corporation in its possession, — he will not be heard to defend by impeaching the corporate title. *Cole Silver Min. Co. v. Virginia, &c. Water Co.*, 1 Sawyer (U. S. C. C.), 470. If a corporation had power to make notes for any purpose, it cannot defend its liability on a note to a *bond fide* holder for value and without notice, on the ground that the particular note was *ultra vires* because made for accommodation, when it was not authorized to make accommodation notes. *Monument Nat. Bank v. Globe Works*, 101 Mass. 57. And in any event, the defence that the note of a corporation was made *ultra vires* is to be shown affirmatively; it need not be anticipated in pleading. *Montague v. Church School Dist.* 34 N. J. L. 218. One who has loaned money to a corporation is not affected by a misappropriation of the funds by the officers of the corporation, in the absence of his participation in the fraud; and such misappropriation will not constitute a defence to an action for the recovery of the money. The corporation cannot set up such defence; nor can stockholders who have been cognizant of such a misapplication of the funds borrowed by the corporation, and have participated in any advantages resulting therefrom. *Thompson v. Lambert*, 44 Iowa, 239. If the general purpose of a corporation is not

It may be said to be settled, upon the weight of authority, that neither the corporation nor an individual entering into a contract with it can avoid a contract of sale and purchase of property, where the property is delivered; nor can the individual reclaim the property sold, nor the corporation avoid the payment of the price of the same, on the ground that it had no authority to make the contract,—so long, at least, as it retains it and enjoys the benefit of the contract.<sup>1</sup> The ordinary principles of justice would require a corpora-

unlawful, the fact that some of the members may have been guilty of unlawful acts in attempting to carry the purpose into effect will not defeat an action in behalf of the association as a body to recover money belonging to the body. *Snow v. Wheeler*, 113 Mass. 179. Nor can the treasurer of an association set up in defence of their action for the society's funds, that the purpose and object of the society are unlawful. *Willson v. Owen*, 30 Mich. 474.

<sup>1</sup> *Parish v. Wheeler*, 22 N. Y. 494; *Bissell v. The Michigan, &c. R. R. Co.*, id. 258; *White v. Franklin Bank*, 22 Pick. 181; *Tracy v. Talmage*, 14 N. Y. 162; *De Graff v. American Linen, &c. Co.*, 21 id. 124; *Foster v. LaRue*, 15 Barb. (N. Y.) 323; *Gould v. Town of Oneonta*, 3 Hun (N. Y.), 401; *Hazelhurst v. Savannah, &c. R. R. Co.*, 43 Ga. 54; *Southern Life Ins. Co. v. Lanier*, 5 Fla. 110. A stockholder who has acquiesced in an act done by the corporation which is *ultra vires* simply because in excess of its powers, is estopped from afterward denying the validity of the act; as, where he has voted for an assessment which is *ultra vires*, or with knowledge of the facts made payments upon it. *Ossipee Mfg. Co. v. Canney*, 54 N. H. 295; *Macon, &c. R. R. Co. v. Vason*, 57 Ga. 314; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Williamette Freighting Co. v. Stannus*, 4 Oregon, 261. And a corporation which has borrowed money and used it for a purpose beyond its corporate powers, is estopped from setting up, in defence to an action to recover the loan, that the lender knew that the money was to be used for *ultra vires* purposes, — unless the use was of an immoral or illegal character. *Bradley v. Ballard*, 55 Ill. 413. In *Memphis & L. R. R. Co. v. Dow*, 19 Fed. Rep. 388, a railroad corporation organized in Arkan-

sas issued bonds secured by a trust mortgage of its franchises and other property; the mortgage was foreclosed, and a scheme of reorganization adopted, in pursuance of which the company conveyed all its property to the trustees, and the bondholders formed a new corporation, to which the franchises and other property of the old one were conveyed by the trustees. The new corporation, thus composed entirely of the original bondholders, issued its bonds to those bondholders, secured by mortgage of its franchises and other property; and the new bonds were received in lieu of the old. Afterward portions of the stock passed into other hands. It was held that the bonds constituted a valid obligation, notwithstanding the stockholders of the contracting corporation were the contractees, and notwithstanding a provision in the constitution of Arkansas forbidding private corporations to issue stock or bonds except for value actually received. *WALLACE, D. J.*, said: "The primary questions then are: first, whether upon the purchase of property the corporation could mortgage what it acquired, to secure the purchase-money; and second, whether section 9 of the charter has any application to such a transaction. It is to be observed that the complainant does not question its own power to acquire the money conveyed to it. It cannot do this while it holds on to the property and seeks to remove the lien of the mortgage. If it could legitimately purchase, why could it not, like an individual purchaser, mortgage to secure the price? A corporation, in order to attain its legitimate objects, may deal precisely as can an individual who seeks to accomplish the same ends, unless it is prohibited by law to incur obligations as a borrower of money. 'Corporations having the power to borrow money may mortgage their prop-

tion to pay for property actually received and appropriated, to repay money borrowed and expended, and to pay for labor and services

erty as security. Although it was at one time a question whether express legislative consent was not required in order to authorize a mortgage of any corporate property, as for example in *Steiner's Appeal*, 27 Penn. St. 313, yet the rule now is that a general right to borrow money implies the power to mortgage all corporate property except franchises, unless restrained by express prohibition in the act of incorporation or by some general statute.' Green's *Brice's Ultra Vires* (2d ed.), 223, 224. In the late case of *Philadelphia, &c. R. R. Co. v. Stickler*, 21 Am. Law Reg. 713, the Supreme Court of Pennsylvania considered the question, and *PAXSON, J.*, delivering the opinion of the court, said: 'So far as the mere borrowing of money is concerned, it is not necessary to look into the charter of the company for a grant of express powers. It exists by necessary implication. . . . The reason is plain. Such corporations are organized for the purposes of trade and business; and the borrowing of money and issuing obligations therefor are not only germane to the objects of their organization, but necessary to carry such objects into effect.' In *Platt v. Union Pacific R. R. Co.*, 99 U. S. 48-56, Mr. Justice *SRONG*, speaking for the court, says: 'Railroad corporations are not usually empowered to hold lands other than those needed for roadways and stations or water privileges. But when they are authorized to acquire and hold lands separate from their roads, the authority must include the ordinary incidents of ownership, — the right to sell or to mortgage.' The right of mortgaging follows as a necessary incident to the right of managing the business of a corporation according to the usual methods of business men. The right of a corporation to mortgage its franchises, or the property which is essential to enable it to perform its functions, is generally denied by the authorities. But does the reason upon which this denial rests have any application to a case like the present? The foundation of the doctrine is that such a mortgage tends to defeat the purposes for which the corporation was chartered, and the implied

undertaking of those who obtained the charter to construct and maintain the public work and exercise the franchises for the public benefit. Some judicial opinion is found to the effect that there is no good reason for denying the right to make such a mortgage without legislative consent, because the transfer of the franchise to new hands through a foreclosure is in fact a change no greater than may take place within the original corporation, and the public interests are as safe in such new hands as they were in those of the original corporators. *Shepley v. Atl. & St. L. R. R. Co.*, 55 Me. 395-407; *Kennebec & P. R. R. Co. v. Portland & K. R. R. Co.*, 59 id. 9-23; *Miller v. Rutland & W. R. R. Co.*, 36 Vt. 452-492. Here the mortgage was executed to enable the corporation to resume the exercise of its charter powers and fulfil the purposes for which it was originally created. No precedent has been found denying to a corporation the power to execute a mortgage of everything it acquires by a purchase, when the mortgage is a condition of making a purchase; and there seems to be no reason in a case like the present for denying the power when the purchase of the mortgagor includes the franchise and the whole property of the corporation. Section 9 of the charter is not a restriction upon the implied power of the corporation to incur such obligations as are necessary to enable it to carry on its business. It is a provision which would seem to be intended to enlarge rather than to restrict the power of the corporation in this regard. Its purpose is to authorize an increase of capital, to an extent commensurate with the necessities of the corporation, in any of the modes usually adopted by corporations for raising money, — a provision which was necessary in view of section 4 of the charter, which limited the amount of increase. As a corporation has no implied authority to alter the amount of its capital stock when the charter has definitely prescribed the limit, this permission was necessary. The purchase of property by the corporation, for cash or on credit, is not an increase of its capital. There is another ground, however, upon

actually received. If the agents or officers make *ultra vires* contracts, they may be personally responsible to the stockholders for

which the decision of the case may rest more satisfactorily. Assuming that the complainant transcended its charter powers in creating the mortgage bonds in question, it cannot be permitted to retain the benefits of its purchase and at the same time repudiate its liability for the purchase price. The rule is thus stated by a recent commentator: 'The law founded on public policy requires that a contract made by a corporation in excess of its chartered powers be voidable by either party while a rescission can be effected without injustice. But after a contract of this character has been formed by either of the parties, the requirements of public policy can best be satisfied by compelling the other party to make compensation for a failure to perform on his side.' Morawitz Corp. § 100. It is to be observed that in the present case there is no express statutory or charter prohibition upon the corporation to purchase the property or mortgage it for the purchase-money. At most, its acts were *ultra vires*, because outside the restricted permission of the charter. It is not necessary therefore to consider the distinction made by some of the adjudications between the two classes of cases. *Hitchcock v. Galveston*, 96 U. S. 341. The decided weight of modern authority favors the conclusion that neither party to a transaction *ultra vires* will be permitted to allege its invalidity while retaining its fruits. The question has frequently been considered in cases where a corporation, suing to recover upon a contract which has been performed on its side, is met with the defence that the contract was *ultra vires*, or prohibited by the organic law of the corporation. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Oil Creek & A. R. R. Co. v. Penn. Transp. Co.*, 83 Penn. St. 160; *Bly v. Second Nat. Bank*, 79 id. 453; *Gold Min. Co. v. Nat. Bank*, 96 U. S. 640; *Nat. Bank v. Matthews*, 98 id. 621. The latter case is a forcible illustration of the rule generally adopted. There, a national banking association was proceeding to enforce a deed of trust given to secure a loan on real estate made by the association in contravention of § 5136, Revised Statutes, prohibiting

by implication such an association from loaning on real estate, and the maker of the trust deed sought to enjoin the proceeding upon that ground. The court, speaking through Mr. Justice SWAYNE, cite with approval Sedg. St. & Const. Law, 73, in which the author states that the party who has had the benefit of the agreement will not be permitted to question its validity, when the question is one of power conferred by a charter. Another class of cases is where the corporation itself attempts to set up its own want of power, in order to defeat an agreement or transaction which is an executed one as to the other party, and from which the corporation has derived all that it was entitled to. Such cases were *Parish v. Wheeler*, 22 N. Y. 494; *Bissell v. M. S. & N. I. R. R. Co.*, id. 258; *Hays v. Galion Gas Co.*, 29 Ohio St. 330-340; *Attleborough Bank v. Rogers*, 125 Mass. 339; *McCluer v. Manchester R. R. Co.*, 13 Gray, 124; *Bradley v. Ballard*, 55 Ill. 418; *Rutland & B. R. R. Co. v. Proctor*, 29 Vt. 93. In the first of these cases the court say: '*It is now very well settled that a corporation cannot avail itself of the defence of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract.* If an action cannot be brought directly upon the agreement, either equity will grant relief, or an action in some other form will prevail.' The present case is phenomenal in the audacity of the attempt to induce a court of equity to assist a corporation in repudiating its obligations to its creditors without offering to return the property it acquired by its unauthorized contract with them. The fundamental maxim is that he who seeks equity must do equity. Every stockholder of the corporation when he acquired his stock took it with notice explicitly embodied in his certificate that his interest as a stockholder was subordinate to the rights of the holders of the mortgage bonds. It is now contended that if there is any obligation on the part of the corporation to pay for the property it purchased, it is not to pay what it agreed to, but to pay a less



damages sustained by reason of such contracts, and they may be restrained from entering into or executing such contracts by the stockholders, or perhaps creditors interested in the matter. But when such a contract is once executed, it would appear consonant with principles of justice and equity to sustain the contract where the corporation has received the consideration, though executed on the part of the corporation in excess of authority of either the agents executing the same or the corporation itself.<sup>1</sup>

In an Illinois case,<sup>2</sup> LAWRENCE, C. J., says: "It is said by the counsel for the complainant that a corporation is not estopped to say in its defence that it had not the power to make a contract sought to be enforced against it, for the reason that if thus estopped its powers might be indefinitely enlarged. While the contract remains unexecuted on both sides, this is undoubtedly true, but when, under cover of this privilege, a corporation seeks to evade the pay-

consideration, because the property was not worth the price agreed to be paid. The court will not compel the bondholders to enter upon any such inquiry. They are entitled to set their own value on their own property. When the complainant offers to reconvey the property in consideration of which it created its mortgage bonds, it will have taken the first step toward reaching a position which may entitle it to be heard. It may be said, in conclusion, that there would be no difficulty on well-recognized principles in protecting the bondholders against the destruction of their claims, upon the theory of a vendor's lien for the purchase money. The taking of a mortgage by their trustees, so far from evidencing an intention to waive the lien, is conclusive evidence to the contrary."

<sup>1</sup> *Zabriskie v. C. C. & C. R. R. Co.*, 23 How. (U. S.) 381; *Cary v. Cleveland, & C. R. R. Co.*, 29 Barb. (N. Y.) 35; *Argenti v. San Francisco*, 16 Cal. 255; *McCluer v. Manchester, & C. R. R. Co.*, 13 Gray (Mass.), 124; *Chapman v. M. R., & C. R. R. Co.*, 6 Ohio St. 137; *Hale v. Mutual Fire Ins. Co.*, 32 N. H. 297; *Railroad v. Howard*, 7 Wall. (U. S.) 413. In an action against a corporation to recover damages occasioned by the negligence of its employés, it is no defence to show that the act from which the injury resulted was not authorized by the charter, if the corporation, in

any clear and explicit manner, recognized the act as done in its business, as by employing agents to superintend it, or receiving the profits arising from it. So held where a railway company operated a line of steamers upon which a passenger was injured. *Hutchinson v. Western & Atlantic R. R. Co.*, 6 Heisk. (Tenn.) 634. A contract by which a street railway company transfers the entire control of the road, with all its franchises, receiving in return only a fixed rent, paid in the form of a dividend to its stockholders, is *ultra vires* and void. *Middlesex R. R. Co. v. Boston & Chelsea R. R. Co.*, 115 Mass. 347. Where a railway station is erected upon arches, the land under the arches is not "superfluous land" within the meaning of the Lands Clauses Act of 1845. Therefore such land cannot be sold as superfluous. *Mulliner v. Midland Ry. Co.*, L. R. 11 Ch. Div. 611. But a bondholder of one railway company is not the proper person to object to the right of another company to own shares of the stock of the former. If it exceeded its corporate power in purchasing, they belong to the vendor; the State incorporating is the party offended if a violation of the charter is committed. *Matthews v. Murchison*, 15 Fed. Rep. 691.

<sup>2</sup> *Bradley v. Ballard*, 55 Ill. 417; *Gas Co. v. San Francisco*, 9 Cal. 453.

ment of borrowed money on the ground that although it had power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute, it is pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality. Neither is it correct to say that the application to corporations of the doctrine of equitable estoppel, where justice requires it to be applied (as where, under a claim of corporate power, they have received benefits for which they refuse to pay, from a sudden discovery that they had not the powers they had claimed), can be made the means of enabling them indefinitely to extend their powers. If it were true it would be an insuperable objection to the application of the doctrine, even for the purpose of preventing injustice in individual cases. But it is not true. This doctrine is applied only for the purpose of compelling corporations to be honest, and after whatever mischief may belong to the performance of an act *ultra vires* has been accomplished. But while a contract remains executory, it is perfectly true that the powers of corporations cannot be extended beyond their proper limits for the purpose of enforcing a contract. Not only so, but on the application of stockholders, or any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So too, if a contract *ultra vires* is made between a corporation and another person, and while it is yet wholly unexecuted the corporation recedes, the other contracting party would probably have no claim for damages.<sup>1</sup> But if such other party proceeds in the per-

<sup>1</sup> Such executory contracts as are entirely foreign to the objects and purposes for which the corporation was formed, or which are outside its express or implied powers, are void and cannot be enforced against it. *Rock River Bank v. Sherwood*, 10 Wis. 230. But where a corporation contracts in reference to matters within its powers, but in doing so exceeds its powers, the contract is but void; and the person with whom the contract was made cannot set up such violation of its corporate powers to defeat the contract. *Cannon v. McNab*, 48 Ala. This doctrine is well-stated and illustrated in *Littlewort v. Davis*, 50 Miss.

403, which was a suit in equity to enforce an absolute deed conveying lands as a mortgage to secure a loan to the defendant. The objection urged to the suit was that the trustees were by statute authorized to loan money only on promissory notes with good personal securities, and consequently that a loan secured by mortgage was void. *SIMRALL, J.*, in passing upon this question, said: "A loan of the school fund upon mortgage or security other than that named in the statute would have been a misapplication of the fund, for which the trustees would have been personally liable. *Lindsey v. Marshall*, 12

formance of the contract, expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power. Take, for example, the case of a corporation chartered to build a railway from Chicago to Rock Island. Under such a charter the company would have no power to build steamboats, for the purpose of running a line of such vessels between Rock Island and St. Louis. But suppose the company, notwithstanding the want of power, should make a contract for the building of a vessel, and it is built by the contractor and accepted and used by the railway; would any court permit the corporation, when sued for the value of the vessel, to excuse itself from payment, on the ground that, although it has and uses the steamer, it had no authority to do so by its charter? Or, suppose that, instead of having a vessel built by a contractor, it employs a superintendent to build it, and hires mechanics by the day, could it escape the payment of their wages on the ground that it had employed them in a work *ultra vires*? In cases of such character, courts simply say to corporations, 'You cannot in this case, raise the question

S. & M. (Miss.) 590. Whilst this is so, it does not necessarily follow that the borrower can set up, as a ground to defeat his security, that the statute did not allow a loan upon other than personal security. . . . If a corporation makes a contract *outside* of the purposes of its creation, it is void, because it has no power over the subject in reference to which it acted; but if it contracts with reference to a subject within its powers, but in so doing, exceeds them, the person with whom it deals cannot set up such violation of the franchise to avoid the contract. *Haynes v. Covington*, 13 S. & M. (Miss.) 411; *Banks v. Poitoux*, 3 Rand. (Va.) 136; *Fleckner v. United States Bank*, 8 Wheat. (U. S.) 353; *Commercial Bank v. Nolan*, 7 How. (U. S.) 508; *Little v. O'Brien*, 9 Mass. 423; *Wade v. American Colonization Society*, 7 S. & M. (Miss.) 663. It might be ground for the resumption of the franchise by the State." In *The Bank of S. Carolina v. Hammond*, 1 Rich. (S. C.) 281, a similar question was raised. In that case the charter of the plaintiff corporation directed that loans upon a long time should be secured by mortgage; but

the loan sought to be collected, which was for a long time, was not secured by mortgage but by sureties, and the court held that it was enforceable. In a New York case, *Mott v. United States Trust Co.*, 19 Barb. 568, the charter of a savings bank required that its funds should be invested in or loaned on public stocks, or other personal security should be taken from the borrower, but a loan made to the defendant without *any* security was held binding. See also to the same effect, *United States Trust Co. v. Brady*, 20 id. 119. In *Bank of North Liberties v. Cresson*, 12 S. & R. (Penn.) 306, where the charter of the bank required that a certain species of security should be taken from its officers for the faithful performance of their duties, a different kind of security taken for that purpose was held binding. So, where city bonds were required to be made payable at the city treasury, bonds made payable elsewhere were held not to be thereby invalidated, but only that the provision making them payable elsewhere was void. *Sherlock v. Winnetka*, 68 Ill. 530. *Hough v. Cook County Land Co.*, 73 Ill. 23.

of your power to make the contract. It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of others' labor; and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter.' We are aware that cases may be cited in apparent conflict with the principles here announced, but the tendency of recent decisions is in harmony with them. While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining corporations in advance from passing beyond the boundaries of their charters; they are equally inclined, on the other hand, to enforce those contracts, though *ultra vires*, of which they have received the benefits."

**SEC. 173. Defence not Admitted when it will Operate a legal Wrong.** — The courts of this country are not inclined to admit the defence of *ultra vires*, where the effect would be to accomplish a legal wrong, rather than to promote the ends of justice.<sup>1</sup> Thus, where

<sup>1</sup> Darst v. Gale, 83 Ill. 136; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Ohio, &c. R. R. Co., 96 U. S. 258. In Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285, where a private corporation had executed a promissory note for a sum in excess of the amount of indebtedness permitted by its charter, the court held that it was bound to pay the note, it having received the consideration therefor, and was estopped from setting up its lack of authority, in defence thereto. DICKINSON, J., in delivering the opinion of the court said: "Where a private corporation has authority to issue negotiable securities, such instruments, when issued, possess the legal character ordinarily attaching to negotiable paper, and the holder in good faith, before maturity, and for value, may recover, even though in the particular case the power of the corporation was irregularly exercised or was exceeded; or to state the legal proposition in its application to this case, this defendant having power to incur debts to a limited extent and to issue its negotiable notes therefor, the plaintiff, as a *bona fide* holder of the note in suit, may recover upon it, although in this particular case the indebtedness of the corporation at the time of giving this note already exceeded the limits prescribed by its articles of association. Stoney v. American Life

Ins. Co., 11 Paige (N. Y.), 635; Mechanics' Bank Association v. New York & Saugerties White Lead Co., 35 N. Y. 505; McIntire v. Preston, 10 Ill. 48; Monument National Bank v. Globe Works, 101 Mass. 57; Bissell v. Michigan Southern & Northern Ind. R. R. Co., 22 N. Y. 258, 289; City of Lexington v. Butler, 14 Wall. (U. S.) 282; Moran v. Miami County, 2 Black. (U. S.) 722; Green's Brice's Ultra Vires, 273-4, 729. Although in such a case the corporation or its officers exceeded the corporate authority, and its contract would be, hence, in a sense, *ultra vires*, yet other legal principles, besides those merely relating to the powers of the corporation, come in to affect the result. It is true, a corporation is a being created by the law, and has properly no authority but such as is conferred upon it, expressly or by implication, by the law of its creation; yet it may become legally bound to observe and perform contracts which it had not authority to enter into. The ends of justice may require, as in this case, that the corporation which has exceeded its powers should be estopped by its own acts from pleading, in defence to its assumed obligations, that they were *ultra vires*. To apply the principle of estoppel is not to enlarge the powers of the corporation; nor does it give warrant to a corporation to

the statute simply forbids a corporation to contract a debt or incur a liability, but does not in terms declare the transaction void, and the corporation assumes to make the prohibited transaction, but the circumstances are such that the creditor could not by reasonable diligence know that it is within the prohibition, the defence of *ultra vires* cannot be sustained against him.<sup>1</sup> This is upon the ground that it would be unjust and highly inequitable to permit a corporate act which is within the general power of the corporation, but the invalidity of which arises from something not apparent in the

disregard or violate the restrictions which have been expressly imposed upon it, or which exist in the absence of power conferred. It was said by the court in *Bradley v. Ballard*, 55 Ill. 413: 'This doctrine (estoppel) is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act *ultra vires* has been accomplished.' In *Railway Co. v. McCarthy*, 96 U. S. 258, the court say: 'The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong.' Whether the plea of *ultra vires* should be allowed as a defence to assumed obligations should not be determined without regard to the character and objects of the incorporation, the nature of the powers conferred or withheld, the particular character of the obligations assumed or contract entered into, the relations of the contracting parties, and the *bona fides* of him against whom the doctrine of *ultra vires* is asserted. In this case the defence sought to be made to the note is that in giving it the article of the defendant's incorporation limiting the amount of its indebtedness was violated. The debt was incurred in the ordinary prosecution of the business of the corporation. The defendant received and appropriated the money which was the consideration of the note, and having authority to issue negotiable paper, it put forth the note in question, negotiable, calculated to circulate as, and perform the office of, commercial paper, and expressing upon its face the obligation and promise of the maker to pay to the bearer, at all events, the sum named. It has come into

the hands of a *bona fide* purchaser, and simple justice, as well as plain principles of law, forbid that courts should listen to the plea that in this particular case the corporation had not authority to issue its note. It ought to be and it is estopped. To so hold does not weaken the sanction of the law which restrains the exercise of corporate power within the limits prescribed by the creative act. To refuse to recognize and enforce, when necessary to the attainment of justice and prevention of wrong, such contracts made in violation of the corporate charter, is not to afford a remedy for the wrongful acts of the corporation. When, in a case like this, the unauthorized contract has been executed by the corporation, and it has reaped the benefits of it, public policy does not require the courts to refuse to administer justice between the parties in accordance with the plain principles of law. In such a case the remedy for a violation by the corporation of its charter power lies elsewhere. We are here seeking to administer justice as between these contracting parties. If justice did not invoke the application of other principles of law, the defence of *ultra vires* might be sufficient, but the doctrine of estoppel as a principle of law, is as positive and well recognized as is the law that a corporation may not exceed its corporate powers; and although the defendant exceeded its authority, it should be denied the right to assert the fact of its own wrong, when to allow its plea would work injustice and wrong to him who has been misled by its acts, performed within the general scope of its powers."

<sup>1</sup> *Ossipee, &c. Mfg. Co. v. Canney*, 54 N. H. 295.

charter or articles of association, to be defeated by the corporation upon the ground that it was in fact unauthorized.<sup>1</sup>

<sup>1</sup> Alward v. Holmes, 10 Abb. N. C. (N. Y.) 96; Ellis v. Howe Machine Co., 9 Daly (N. Y. C. P.) 78; Pancoast v. Travellers' Ins. Co., 79 Ind. 172; Auerbach v. Le Sueur Mill Co., 28 Minn. 201; 41 Am. Rep. 285; Relfe v. Columbia Life Ins. Co., 10 Mo. App. 150; Baxter v. Washburn, 8 Lea (Tenn.), 283. In Monument National Bank v. Globe Works, 101 Mass. 67, the question was, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, could be enforced against them, when it was in fact made as an accommodation note. HOAR, J., said: "The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any person taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers; and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute. The court are all of opinion that this position is not tenable, and that the defence cannot be maintained. It has long been settled in this commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. Narragansett Bank v. Atlantic Silk Co., 3 Met. (Mass.) 282. And it was held in Bird v. Daggett, 97 Mass. 494, as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully stated, in Bird v. Daggett; but it was assumed that the doctrine announced was clear and undoubted law. The doctrine of *ultra vires* has been carried much farther in England than the courts in this country

have been disposed to extend it; but, with just limitations, the principle cannot be questioned, that the limitations to the authority, powers and liability of a corporation are to be found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers. But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply. As was said by SELDEN, J., in Bissell v. Michigan Southern & Northern Indiana Railroad Co. 22 N. Y. 289, 290: "There are, no doubt, cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bonâ fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question

If there is nothing on the face of negotiable instruments executed by a corporation to indicate that they are *ultra vires*, and it had power to issue such instruments in the conducting of its legitimate business, a defence on that ground could not be set up to defeat a recovery thereon by a *bond fide* holder for value, without notice of the excess of authority in issuing them for the particular purpose for which they were issued.<sup>1</sup> But where two distinct railroad com-

of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed.' This doctrine seems to us sound and reasonable, and, in conformity with it, it was held in *Farmers & Mechanics' Bank v. Empire Stone Dressing Co.*, 5 Bosw. (N. Y.) 275, that an accommodation acceptance by an officer of a mining corporation, on behalf of the company, was not binding unless the consideration had been advanced upon the faith of the acceptance; but that if the consideration was paid in good faith, after the acceptance and upon the credit of it, it could be enforced. So it was said by Lord St. LEONARDS, that he felt a disposition 'to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into.' *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 331, 373. The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or, for the most part, those in which the other contracting party had notice, upon the face of the transaction, of the want of corporate power. There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful act of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this commonwealth, for one committed by its servants. Bills of a bank issued without consideration, and even stolen, are good in

the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests."

<sup>1</sup> *Monument Bank v. Globe Works*, 101 Mass. 57; *Attorney-General v. Insurance Co.*, 9 Paige (N. Y.), 470; *Bissell v. Michigan, &c. R. R. Co.*, 22 N. Y. 258; *Mechanics' Banking Association v. White Lead Co.*, 35 id. 505; *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Morford v. Farmers' Bank*, 26 Barb. (N. Y.) 568; *Bridgeport City Bank v. Empire, &c. Co.*, 30 id. 421; *Central Bank v. same*, 26 id. 23; *Bank of Genesee v. Patchin*, 13 N. Y. 309. As a general rule, a corporation, unless constrained by law may, as incident to its business, receive and transfer notes and bills. *Buckley v. Briggs*, 30 Mo. 452; *Frye v. Tucker*, 24 Ill. 180; *Hardy v. Merriweather*, 14 Ind. 203; *Lucas v. Pitney*, 27 N. J. L. 221. A corporate act assumed to be done in violation of restrictions imposed by statute on the exercise of the corporate powers, or an authorized act done by a prohibited method, will be void equally, whether the powers are inherent or conferred by express law; although when the limitation is only in respect to extent or quantity allowable, the act may be sustained up to the limit, and held void only as to the excess. *Farmers', &c. Bank v. Harrison*, 57 Mo. 503. A statute forbidding corporations to exercise any powers except those ordinarily incident to corporate existence, the powers expressly conferred on a particular corporation, and those which may be necessary to the exercise of the powers so enumerated and given, must be construed as a prohibition of any acts not within the scope of the powers permitted, and as operating to render contracts in contravention of it illegal and invalid. *Morris, &c. R. R. Co. v. Sussex R. R. Co.*, 20 N. J.

panies consolidated without authority, and they were placed under the same management, it was held that the indorsee of a note given by the managers of the consolidated company for the purchase of a steamboat could not recover on it.<sup>1</sup> The principles of estoppel are held to apply where the proceedings are questioned on the ground of the unconstitutionality of a statute, as well as where they are sought to be impeached on other grounds.<sup>2</sup> The application of the doctrine has two phases, one where the public is concerned, and one where the question is between the corporation and its stockholders, or third persons. When the *public* is concerned, neither the assent of the stockholders nor any act of theirs or of the corporation can give validity to an unauthorized act.<sup>3</sup> But when the question arises between the corporation and its stockholders, the latter seeking to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied, on the ground of his express assent, or his intelligent though tacit consent to the corporate action. And where third persons have dealt with the company,

Eq. 542. To render a corporate contract void for exceeding the corporate powers, there is no need that the statute by which it is prohibited should in express terms pronounce it void if attempted to be made. If the statute prohibits such a contract, — as where a foreign insurance company assumes to do business within a State, without complying with the conditions imposed by the laws of the State for foreign companies to observe, — the contract is void so far that the corporation cannot recover upon it. *Cincinnati, &c. Co. v. Rosenthal*, 55 Ill. 85. But where the statute simply forbids the corporation to contract the debt or incur the liability, but does not declare the transaction void, and the corporation has assumed to make the prohibited transaction, but the circumstances are such that the creditor could not by reasonable diligence know that it was within the prohibition, the objection of *ultra vires* cannot be sustained against him. *Ossipee, &c. Mfg. Co. v. Canney*, 54 N. H. 295. Corporate bonds, issued within a charter power, but sold at a discount which brings them within the prohibitions of the general usury law, are not necessarily void for abuse of power; they may be subject to the defence of usury, and the officers issuing them may

be personally liable. *Sherlock v. Winnetka*, 68 Ill. 530. So a statute providing that "no corporation shall engage in mercantile or agricultural business, nor in commission, brokerage, stock-jobbing, exchange, or banking business of any kind," does not invalidate one isolated contract for the purchase of goods. The prohibition only refers to the buying and selling of articles of merchandise as an employment, and implies operations conducted with a view of realizing the profits which come from skilful purchase, barter, speculation, and sale. *Graham v. Hendricks*, 22 La. An. 523. As a rule, a contract by a corporation outside of the purposes of its creation is void, for want of power over the subject. But where a corporation contracts with reference to a subject *within* its powers, although in so doing it exceeds them, the person with whom it deals cannot set up such violation of its franchises to avoid the contract. *Littlewort v. Davis*, 50 Miss. 403.

<sup>1</sup> *Pearce v. Madison, &c. R. R. Co.*, *ante*.

<sup>2</sup> *DOYLE, J.*, in *Tom v. Columbus*, 39 Ohio St. 281; *State v. Mitchell*, 31 Ohio St. 592; *Counterman v. Dublin*, 38 id. 515; *Daniels v. Tearney*, 96 U. S. 341.

<sup>3</sup> *Hitchcock v. Galveston*, 96 U. S. 341.



relying in good faith upon corporate authority to do an act, there is not needed that there be an express assent thereto on the part of the stockholders to work an equitable estoppel. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence, or tacit assent, to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after the knowledge of the commitment of it, whereby innocent parties have been led to put themselves in a position from which they cannot be taken without loss. It is the doctrine of equitable estoppel which applies to members of associated or corporate bodies, as well as to persons acting in a natural capacity.<sup>1</sup> The estoppel in such case would apply as well to third persons dealing with the corporation, and receiving the benefit of the *ultra vires* act or contract, as to the members of the corporation, and would arise from the same facts.<sup>2</sup>

**SEC. 174. Power to deal in Stocks.**—Unless a corporation is invested with express or implied authority to do so, it has no authority to invest its money in the stocks of any other corporation.<sup>3</sup> It would open the door to the perversion of the objects and purposes for which railroad, manufacturing, and other similar corporations are established, to permit them to become subscribers for the stock of other corporations, without express authority; and would operate as a fraud upon the shareholders, who took the stock of the corporation with the implied condition that its capital should be employed only in the prosecution of the legitimate business of the corporation;<sup>4</sup> and a prohibition against such investments is implied from the circumstance that the power was not conferred;<sup>5</sup> and especially is this the case where the investment is made for the purpose of obtaining control of another corporation.<sup>6</sup>

<sup>1</sup> FOLGER, J., in *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

<sup>2</sup> DOYLE, J., in *Tone v. Columbus*, 39 Ohio St. 281.

<sup>3</sup> *Franklin County v. Lewiston Bank*, 68 Me. 43; *Mutual Savings Bank v. Meriden Agency Co.*, 24 Conn. 159; *Berry v. Yates*, 24 Barb. (N. Y.) 199; *Talmage v. Pell*, 7 N. Y. 348; *Pearson v. Concord R. R. Co.*, 59 N. H. —; *Milbank v. Lake Erie, &c. R. R. Co.*, 63 How. Pr. (N. Y.) 20; *Elkins v. Camden, &c. R. R. Co.*, 36

N. J. Eq. 5; *Balfour v. Edinburgh, &c. Railway Co.*, 10 Sess. Cas. (Sc.) (2 Series) 1240.

<sup>4</sup> *Pearson v. Concord R. R. Co.*, *ante*; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, &c. R. R. Co.*, 43 id. 13.

<sup>5</sup> *First National Bank v. National Exchange Bank*, 92 U. S. 122.

<sup>6</sup> *Pearson v. Concord R. R. Co.*, *ante*; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Sumner v. Marcy*, 3 W. & M. (U. S. C. C.)

But such corporations may undoubtedly take the stock of other corporations in payment of a debt due to them.<sup>1</sup> And some corporations from the very nature of the powers conferred upon them, may become stockholders in other corporations, provided they do so *bonâ fide*, and with no sinister design, and there is nothing in the charter which prohibits it.<sup>2</sup> It is also held that a corporation may take its own stock in payment of a debt due to it;<sup>3</sup> or for other unobjectionable purposes;<sup>4</sup> but the *bona fides* of the transaction is an essential element to give it validity; and it may hold it as it does other corporate property;<sup>5</sup> and the stock, by such transfer to the corporation, does not necessarily merge, but is kept on foot, and may be re-issued.<sup>6</sup> But without express authority to do so, a corporation cannot deal in its own stock; that is, buy and sell it in the open market or otherwise, for speculative purposes;<sup>7</sup> as such power would naturally tend to fraud and "rigging" the market, on the part of the corporation itself.<sup>8</sup>

**SEC. 175. Purchase of Rival Road.**—A railway corporation has no power, unless expressly given by its charter to purchase a rival road, as such an act is held to be not only *ultra vires*, but also opposed to public policy, by defeating competition and tending to create a monopoly. Thus the directors of a railroad company, without any authority either by statute or charter, passed a resolution to assume certain debts and to buy a majority of the stock and bonds and the equipment of a rival railroad. The resolutions also provided for the

105; *Hazelhurst v. Savannah R. R. Co.*, 43 Ga. 13.

<sup>1</sup> *Fleckner v. Bank*, 8 Wheat. (U. S.) 351; *National Bank v. National Exchange Bank*, 92 U. S. 128.

<sup>2</sup> *In re Barneda Bank*, L. R. 3 Ch. 105; *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392; *Booth v. Robinson*, 55 Md. 419; *Green's Brice's Ultra Vires*, 91.

<sup>3</sup> *Barton v. Port Jackson, & Co. Plank Road Co.*, 17 Barb. (N. Y.) 347; *Hartridge v. Rockwell*, R. M. Charl. (Ga.) 260; *Cooper v. Frederick*, 9 Ala. 738; *Gillett v. Moody*, 3 N. Y. 479; *State v. Building Assoc.*, 35 Ohio St. 258.

<sup>4</sup> *Chicago, & C. R. R. Co. v. Marseilles*, 84 Ill. 145; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Iowa Lumber Co. v. Foster*, 49 Iowa, 25.

<sup>5</sup> *State Bank v. Fox*, 3 Blatchf. (U. S. C. C.) 431; *Taylor v. Miami Exporting*

*Co.*, 6 Ohio, 177; *Bank v. Bruce*, 17 N. Y. 507.

<sup>6</sup> *Ex parte Holmes*, 5 Cow. (N. Y.) 346. In *Rivanna Navigation Co. v. Dawson*, 3 Gratt. (Va.) 19, a bequest to a corporation of its own stock was held to be good. See, as to main proposition, *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418; *Savings Bank v. Wulfe Kuhler*, 19 Kan. 60; *State v. Smith*, 48 Vt. 266; *Chicago, & C. R. R. Co. v. Marseilles*, 84 Ill. 643.

<sup>7</sup> *Coppin v. Greenlies, & Co.*, 38 Ohio St. 275; *In re London, Hamburg, & Continental Exchange Bank*, L. R. 5 Ch. 444; *Hall's Case*, L. R. 5 Ch. 707; *Evans v. Coventry*, 25 L. J. Ch. 489. But see *Dupee v. Boston Water Power Co.*, 114 Mass. 37; *Chicago, & C. R. R. Co. v. Marseilles, ante*.

<sup>8</sup> *Green's Brice's Ultra Vires*, 95.

calling of a special meeting of the stockholders to vote upon the matter, and it was not to be carried out without their approval. It was held that the proposed purchase was *ultra vires*, and hence could not be executed even if ratified by the stockholders; that it was void and against public policy in that its object was to prevent lawful competition, and that it could be enjoined upon the application of a single stockholder of the purchasing company, and that the fact that such stockholder had obtained his stock after the passage of the resolutions, and with the avowed design of preventing its consummation, would not affect his right to relief.<sup>1</sup>

<sup>1</sup> In *Morgan v. Donovan*, 58 Ala. 241, it appeared that an act chartering a corporation to construct and operate a railroad between Mobile and New Orleans empowered it to acquire and hold such real property as might be necessary therefor, and to obtain any steamboats, piers, "wharves," and the appurtenances thereunto belonging, that the directors might deem necessary, profitable, and convenient to use and manage in connection with said railroad. The corporation executed certain deeds of trust of "the lands occupied by said railroad," &c., "in connection with said portion of said railroad situate within the limits of said cities," &c., or on the "line thereof," also of "all depots, station-houses, wharves," &c., "used in connection with its said railroad, together with all steamboats and personal property," &c., "used exclusively for constructing, maintaining, operating, or conducting the business of said railroad." It was held, (1) that, in these deeds of trust, property acquired and owned, and not used or to be used in connection with the railroad, and in promotion of the direct and proximate purposes of its construction, did not pass; (2) that property bought of an opposition steamship line, *not with a view of employing it in connection with the business of the road, but to withdraw it from business, thereby preventing competition*, was not authorized to be acquired by the charter, and not conveyed by the granted clauses in said deeds of trust. In a California case, *Mahoney v. Spring Valley Water Works*, 52 Cal. 159, it was held that the California water corporation act does not empower a water company, after commencing proceedings

for the taking of private property, to sell and transfer its right to another water company, nor to prosecute proceedings for the taking of private property in the name of another company. The rule seems to be, that parties dealing with corporations are chargeable with notice of the limitations imposed by the charter upon their powers; and that in the United States one corporation cannot hold or deal in the stocks of another, unless expressly authorized by law to do so. *Kean v. Johnson*, 9 N. J. Eq. 401; *Gifford v. New Jersey R. R. Co.*, 10 id. 171; *Beman v. Rufford*, 6 Eng. Law & Eq. 106; *Grant on Corp.* 290; *Zabriskie v. Hackensack & N. Y. R. R. Co.*, 18 N. J. Eq. 178; *Black v. Del. & Rar. Can. Co.*, 24 id. 455; *Hawes v. Contra Costa Water Co.*, 21 Am. L. R. (N. s.) 252; *Elkins v. Camden & Atlantic R. R. Co.*, 36 N. J. Eq. In *Colles v. Trow City Directory Co.*, 11 Hun (N. Y.), 397, a corporation was organized for the purpose of printing and selling books, principally a directory. G. having published a similar directory, which he sold for a less price than the price of the directory of the corporation, the trustees of the corporation, in order to prevent the future publication of a directory by G., entered into an agreement with G.'s printer by which the corporation purchased of the printer one-half of G.'s overdue notes for a certain sum, and paid to the printer \$1,000 in addition, in consideration of which the printer agreed to publish no more directories for G., and to sue upon and get into judgment the indebtedness due from him, in order to ruin his credit. It was held, that the agreement was *ultra*

But where the charter empowers a company to consolidate with any other railroad company, such a purchase is valid, because authorized. Thus, the South Georgia & Florida Railroad Co., having power, by its charter, to construct a railroad from Albany to Thomasville, Georgia, and from Thomasville to the Florida line, and also power to purchase and sell all kinds of property of every nature and quality, and to incorporate its stock with that of any other company, contracted with the Albany & Gulf Railroad Co. to construct its road from Thomasville to Albany, and to sell and deliver it to the latter company in sections as completed, together with the franchise of using the same, and to incorporate its stock created for building said road with that of the Albany & Gulf Railroad Co. It was held that this contract was not *ultra vires*,—the court saying: “The Albany & Gulf Railroad Co. had the same general power, except that of incorporating its stock with that of other companies, and had the right under its charter also to construct a railroad from Thomasville to Georgia. It was held that it was not acting *ultra vires* to make the purchase of said road and franchises as above stated, and to pay for the same by issuing its own stock therefor; which was delivered to and accepted by the contractors in lieu of the stock of the South Georgia & Florida Railroad Co., which latter stock they had subscribed for and agreed to take in payment for the work of construction. When a railroad company has the right of constructing a particular line of railroad, with general power to purchase all kinds of property of whatever nature or kind, it may purchase from another company a road constructed upon that line, if the latter company has power to sell and dispose of the same. As a general rule, a corporation cannot dispose of its franchises, nor a railroad company its road, without legislative authority; but in this case it was held that the legislative authority existed. Prior to the purchase of the railroad, the Albany & Gulf Railroad Co. had executed a trust deed by way of mortgage upon all its railroad and property, acquired or to be acquired. It was held that inasmuch as the road purchased was within its chartered limits, and might have been constructed if it had not been purchased, the mortgage extended to and covered the said road when purchased, the same as it would have done had the company itself constructed it. The contractors who built the

*vires* and void, and that a trustee and stockholder of the corporation was entitled to an injunction to restrain his co-trustees from using the funds of the corporation to carry it into effect.

road and accepted in payment therefor the stock of the Atlantic & Gulf Railroad Co. in lieu of that of the South Georgia & Florida Railroad Co., and the assignees and purchasers of the stock, after the transaction between the two companies has been carried into effect, and the road has been possessed and operated by the Atlantic & Gulf Railroad Co. for several years, are estopped from claiming the right to be regarded as stockholders of the South Georgia & Florida Railroad Co., or as preferred creditors as against the railroad itself. Having voluntarily accepted the position of stockholders of the purchasing company, they cannot question the validity of the transaction adversely to it, or to the mortgage given by it, covering the road in question. The stock thus issued and accepted was preferred stock, on which interest was payable. It was held that the holders thereof and their assigns, having accepted it, and received interest on it for several years, are estopped from questioning the power of the company to issue such preferred stock. The South Georgia & Florida Railroad Co., having received all it stipulated for, and having incorporated its stock with that of the Albany & Gulf Railroad Co., by accepting the stock of that company in lieu of issuing its own stock, and being in fact amalgamated therewith so far as the road in question is concerned, has no ground to complain that the terms of the contract have not been fulfilled by the Atlantic & Gulf Railroad Co. It has lost nothing. It has not incurred any liability which is not protected by first liens on the road, the priority of which is conceded by all parties.”<sup>1</sup>

SEC. 176. *Authority to aid in other Enterprises.*—Upon principle, it would seem not to be within the scope of the authority of a railroad corporation to lend either its funds or its credits to another railroad corporation to aid in the construction of another railroad, as such an act can in no sense be said to have been within the contemplation of the legislature or to come within the scope of the powers granted to it to build and operate its own road.<sup>2</sup> Thus, in an English case,<sup>3</sup> it was held that an agreement by a railway company to contribute towards the Parliamentary deposit required for bills pro-

<sup>1</sup> *Branch v. Jesup*, U. S. S. C. 1883.

<sup>2</sup> See *Stevens v. Rutland, &c. R. R. Co.*, 29 Vt. 545; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775; *Caledonian, &c. Ry. Co. v. Helensburgh Harbor Trustees*, 39 Eng. L. & Eq. 28. In *McMillan v. Carson Hill*

*Mining Co.*, 12 Phila. (Penn.) 404, it was held that a corporation having the right to mine, in organizing another corporation for mining purposes, acts without the scope of its authority.

<sup>3</sup> *Mannell v. Midland Gt. Western Ry. Co.*, 1 H. & M. 130.

moted by another company, is *ultra vires*, and that the same is also true of an agreement to take shares in a future extension of another company. If this power was conceded to railroad corporations, there would be no safeguards for the security of stockholders, and the implied contract between them and the corporation as to the expenditure of the corporate funds solely in the prosecution of the original enterprise chartered, would lose its validity. Much latitude is given to these corporations under the head of implied powers; and where there is any real foundation for such an inference, they are conceded authority to do many acts which were not contemplated when the enterprise was put on foot; but where there is no ground for an inference of authority from the charter, no power can be assumed by them to invest the funds of the corporation in support of any project not pointed out by the act of incorporation.<sup>1</sup>

**SEC. 177. No Authority to issue irredeemable Bonds.**—Under an authority to borrow money a railroad company has no right to

<sup>1</sup> *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 435; *Com. v. Cullen*, 3 W. & M. (U. S. C. C.) 105; *Mill Dam Co. v. Dane*, 30 Me. 347; *Winter v. Muscogee R. R. Co.*, 11 Ga. 438; *Hamilton Plank Road v. Rice*, 7 Barb. (N. Y.) 157; *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; *Munt v. Shrewsbury, &c. Ry. Co.*, 13 id. 1; *East Anglian Ry. Co.*, 11 C. B. 775; *MacGregor v. Dover, &c. Ry. Co.*, 18 Q. B. 618; *Macedon Plank Road Co. v. Lapham*, 18 Barb. (N. Y.) 312. The Oil Creek & Allegheny River R. R. Co. agreed to pay the Pennsylvania Transportation Co., an oil-pipe line, a certain sum per barrel on all oil transported by it, in consideration that the pipe-line would deliver all the oil under its control to the railway company for transportation; the pipe-line performed its part of the agreement and brought suit to recover the price agreed on. It was held that the railway company could not set up as a defence that the contract was *ultra vires*. *Oil Creek & Allegheny River R. R. Co. v. Pennsylvania Transportation Co.*, 83 Penn. St. 160. Where the bonds of a corporation were issued on the understanding that they were to be sold for cash, but were in fact pledged to a creditor as collateral security for corporate notes held by him, the objection that this disposition

of them is unlawful is one that is open only to the corporation or its stockholders, unless it also affected some existing right; it cannot be raised by one who holds the property of the company under a voluntary conveyance or by a purchaser, at judicial sale, of the equity of redemption. *Beecher v. Marquette & Pacific Rolling Mill Co.*, 45 Mich. 103. A contract by one corporation to supply rolling stock for the use of another was held not *ultra vires*. *Attorney-General v. Great Eastern Ry. Co.*, L. R. 5 App. Cas. 473. So an agreement whereby one railway company grants running powers over its line to another company, in consideration of the guaranty of dividends upon certain preferred stock, is not *ultra vires*. *South Yorkshire Ry. Co. v. Great Northern Ry. Co.*, 9 Exchq. 55; *Great Northern Ry. Co. v. South Yorkshire Ry. Co.*, 9 Exchq. 642. A railway company having the right of constructing a particular line of road, with general power to purchase all kinds of property of whatever nature or kind, may purchase from another company a road constructed upon that line, if the latter company had power to sell and dispose of the same. As a general rule, a corporation cannot transfer its franchises, nor a railroad company its road, without legislative authority. *Branch v. Jesup*, 106 U. S. 468.

raise money by the issue of irredeemable bonds entitling the holder merely to a share of the earnings after the payment of a certain dividend to the stockholders. Nor has it the right to issue interest-bearing bonds, secured by mortgage, if a portion of such bonds are perpetual. Thus, a railroad company, after insolvency and appointment of receivers, adopted a plan by which, in order to pay the floating debt, income bonds were to be issued and sold entitling the holder to a certain dividend and share in the profits after payment of a dividend to stockholders; and in order to retire and pay the mortgage debts of the company, bonds secured by a new mortgage for the whole amount of such debts were to be executed, some of which were to be payable in fifty years, and the others to be perpetual. It was held that in the absence of express legislative authority, the issue of such obligations was beyond the power of the company, and would be restrained by injunction at the suit of stockholders.<sup>1</sup>

**SEC. 178. Acts done under two Charters.** — Where a corporation receives its charter from two States, authority given in one charter to do a certain act will not render such act valid in the other State, although the roads are consolidated and under the same management.<sup>2</sup> But where two corporations, chartered respectively by the States of Michigan and Indiana, with power to each to build and operate a railroad within its own State, united in the business of transporting passengers over a third road in the State of Illinois, beyond the limits authorized by the charter of either, it was held that notwithstanding they, in so doing, might be exceeding their corporate powers, they were jointly liable for injuries to a passenger, resulting from the negligence of their employes.<sup>3</sup>

**SEC. 179. Power to Contract.** — It is hardly necessary to say that a railroad company has, by inference, power to enter into any and all species of contracts which are incident to the purposes for which it was created, and the business in which it is engaged, except in so far as this power is expressly or impliedly restricted by the terms of its charter or the general law, the same as an individual might do;<sup>4</sup> and is entitled to the same rights under, and is subject to the

<sup>1</sup> *Thomas v. West Jersey R. R. Co.*, 101 U. S. 82; *Taylor v. Philadelphia & Reading R. R. Co.*, 7 Fed. Rep. (U. S.) 386.

<sup>2</sup> *Fisk v. Chicago, &c. R. R. Co.*, 4 Abb. Pr. (N. Y.) n. s. 378.

<sup>3</sup> *Bissell v. Michigan Southern, &c. R. R. Co.*, 22 N. Y. 258. But see *Hood*

*v. N. Y. & N. H. R. R. Co.*, 22 Conn. 1, *contra*.

<sup>4</sup> *Chicago, &c. R. R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Racine, &c. R. R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 391; *Mobile, &c. R. R. Co. v. Tallman*, 15 Ala. 472; *Philadelphia, &c. R. R. Co. v. Hick-*

same liabilities upon contracts as an individual would be. If the statute provides that all its contracts shall be in writing, it is construed as relating to executory contracts only.<sup>1</sup> Formerly, it was held that a corporation could contract only under seal, but according to the modern rule, unless specially required by statute it need contract under seal only in those cases where an individual must do so.<sup>2</sup> Of course it is subject to the general statutes, and must contract in writing where the statute of frauds requires contracts by individuals to be in writing.<sup>3</sup>

As we have already seen, their powers are limited, and can only be exercised in carrying out the express powers conferred upon them, and such as are fairly incident to their existence, or so necessary to the enjoyment of the grant that without such express powers they would fail to accomplish the purposes intended by the legislature in creating them.<sup>4</sup> But all acts done by them or contracts entered into in excess of these powers are *ultra vires*, and while executory at least, are not enforceable; and any stockholder may by bill in equity restrain them from doing such acts or entering into such contracts, however advantageous in fact they may be to the corporation.<sup>5</sup> We

man, 28 Penn. St. 318; *Hamilton v. New-castle, &c. R. R. Co.*, 9 Ind. 359; *New Orleans, &c. R. R. Co. v. Ocean, &c. Co.*, 28 La. An. 173; *Faulke v. San Diego, &c. R. R. Co.*, 51 Cal. 365; *Pixley v. Western Pacific R. R. Co.*, 33 Cal. 183; *New Albany, &c. R. R. Co. v. Haskell*, 11 Ind. 301; *Palm v. Ohio, &c. R. R. Co.*, 18 Ill. 217; *Gurney v. Atlantic, &c. R. R. Co.*, 58 N. Y. 358; *Bailey v. Western Vt. R. R. Co.*, 18 Barb. (N. Y.) 112.

<sup>1</sup> *Pixley v. Western Pacific R. R. Co.*, 33 Cal. 183; and even as to executory contracts, they are held in this case to be voidable only.

<sup>2</sup> *Missouri River, &c. R. R. Co. v. Miami*, 12 Kan. 483; *McCullough v. Talladega Ins. Co.*, 46 Ala. 376.

<sup>3</sup> *Pauling v. London, &c. Ry. Co.*, 8 Exchq. 868.

<sup>4</sup> *Gaines v. Coates*, 51 Miss. 335; *Bank of Augusta v. Earle*, 4 Wheat. (U. S.) 636; *Bowling Green R. R. Co. v. Warren County Court*, 10 Bush (Ky.), 712; *Winter v. Muscogee R. R. Co.*, 11 Ga. 438; *Vandall v. S. F. Dock Co.*, 40 Cal. 83; *Mobile, &c. R. R. Co. v. Franks*, 41 Miss.

494; *Downing v. Mt. Washington Road Co.*, 40 N. H. 231.

<sup>5</sup> In *Colman v. Eastern Counties Railway Co.*, 10 Beav. 1, the defendants, for the purpose of encouraging the traffic on their railway, proposed to guarantee certain profits, and secure the capital of an intended steamboat company, who were to run steamboats from Harwich in connection with their railway. But Lord LANGDALE, the Master of the Rolls, held that such a transaction was not within the scope of their authority, and he accordingly restrained them from carrying it into effect. "I am clearly of opinion that the powers which are given by an act of Parliament like that now in question extend no further than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned. I must say, in the absence of legal decision, that the acquiescence of the shareholders in such transactions affords no ground whatever for the presumption of legality." And in *Salomons v. Laing*, 12 Beav. 339, he said:



have already said enough in reference to *ultra vires* acts of corporations. It is sufficient to say that this class of corporations do many

"A railway company incorporated by act of Parliament is bound to apply all the moneys and property of the company for the purposes directed and provided for by the act, and for no other purposes whatever." In *East Anglian Rys. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775, one of the earliest cases at law, JERVIS, L. C. J., said: "It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided for by the statute." In *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 114, WIGRAM, V.-C., said: "The legislature may have thought it right to provide that the capital raised for a specific purpose should not be applied for any other purpose. Under such a state of things, the application of capital so appropriated to any other than the specified purpose must be unlawful. No majority of the shareholders, however large, could sanction the misapplication of such portion of the capital. Indeed, in strictness, *even unanimity would not make such an act lawful.*" In *Shrewsbury, &c. Ry. Co. v. London & Northwestern, &c. Ry. Co.*, 22 L. J. Ch. 682, TURNER, L. J., said: "The great undertakings of these companies could not be carried out by private enterprise, and Parliament has therefore, with a view to the public good, authorized the constitution of large bodies, acting by directors, for the purpose of carrying them out. But these bodies have no existence independent of the acts which create them, and they are created by Parliament with special and limited powers, and for limited purposes. Whether Parliament has wisely limited their powers for the purposes of their incorporation, it is not for us to consider. The fact of their being endued with such powers, and incorporated for such purposes, only shows that Parliament did not think fit to intrust them with more extended powers, or to incorporate them for other purposes." In *South Yorkshire Ry. and River Dun Co. v. Great Northern*

*Ry. Co.*, 9 Exchq. 55, an agreement, under the seals of the two companies, that defendants might, for a term of twenty-one years, have free use of the plaintiffs' railway, works, engines, &c., on payment of certain tolls and under certain conditions, was held, by a majority of the Court of Exchequer, not to be *ultra vires*, the payments to be made being considered tolls within the meaning of statute. In reference to the question of *ultra vires*, PARKE, B., said: "Corporations which are creations of law are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by an act of Parliament for particular purposes, and with special powers, then, indeed, another question arises. Their deed, though under the corporate seal, and that regularly affixed, does not bind them, if it appears by the express provisions of the statute creating the corporation, or by reasonable inference from its enactments, that the deed was *ultra vires*, — that is, that the legislature means that such a deed should not be made." In the *National Manure Co. v. Donald*, 28 L. J. Ex. 185, POLLOCK, L. C. B., said: "There can be no doubt that a Parliament corporation is a corporation merely for the purposes for which it is established by act of Parliament, and it has no existence for any other purpose. *Whatever is done beyond that purpose is ultra vires and void.*" So, in *Eastern Counties Railway v. Hawkes*, 5 H. Lds. 348, LORD CRANWORTH said: "It must, therefore, be now considered as a well-settled doctrine that a company incorporated by act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be." Mr. Brice, in his work on *Ultra Vires*, says: "A corporation is commonly styled a 'legal person,' but the appellation 'person' is applicable to it only by analogy; and the analogy fails when it is thus clearly stated that this legal person

acts in excess of their actual powers; but this circumstance does not render similar acts valid, if objected to by the proper party, however often they may formerly have been done, as they cannot by usage override positive law. All contracts of a corporation which are not contrary to the express provisions of their charter or the general law, are presumed to be within their powers, and the burden is upon those who seek to invalidate them, to show the elements which render them *ultra vires*.<sup>1</sup>

is wanting in much that belongs to a natural person; that its course of existence is marked out from its birth; that it has been called into being for certain special purposes; that it has all the powers and capacities, and only those, which are expressly given it, or are absolutely requisite for the due carrying out of those purposes, and that all the obligations it affects to assume which do not arise from or out of the pursuit of such purposes are null and void." It will be seen that, in the extract from the judgment in *South Yorkshire Ry. and River Dun Co. v. Great Northern Ry. Co.*, PARKE, B., draws a distinction, — and the same distinction has been made in many other cases, as *dicta* only, never as the basis of decision, — between ordinary corporations, "which are bound just as individuals by their own contracts," and those created for particular purposes. But it may fairly be doubted whether any corporations are now, or ever have been, created save for particular purposes; and this for two reasons: 1. Corporations are pure abstractions. They do not actually exist, but only in contemplation and by fictions of law. They are legal persons, in the juridical meaning of the term "persons," or *personæ*, but they are in no wise citizens. Indeed, the chief legal necessity for such a fiction is, that there may be a definite entity to sue and be sued in the courts. This being so, is it not the better and more rational view of these *personæ* — these entities — to say that their implied capacities and incidents extend only so far as the need for their existence ends, than to assume that because analogous to physical beings in some respects, they are therefore in law beings in all respects, and with all legal capacities and incidents? 2. The *raison d'être* of corpora-

tions is to enable associations to accomplish certain ends which single individuals, unaided by the law, could not accomplish; and what are these ends but "particular purposes?" Take, as a strong instance, a university or a London guild. Either can undoubtedly manage, invest, transform, and expend the corporate property in almost any way it pleases; but if they proposed to exhaust the same on the private pleasures of existing members, or to abandon the promotion, the one of education, the other of their "art and mystery," — it is very probable, if not absolutely certain, that the Court of Chancery would restrain the same as being *ultra vires*.

<sup>1</sup> *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Railway Co. v. McCarthy*, 96 U. S. 267; *Southern Express Co. v. Western N. Car. R. R. Co.*, 99 id. 191; *Farmers' &c. Trust Co. v. Clowes*, 3 N. Y. 470; *Talmage v. N. A. Coal Co.*, 3 Head (Tenn.), 337; *Alabama Gold Life Ins. Co. v. Central Agricultural, &c. Assn.*, 54 Ala. 73; *Taylor v. Chichester, &c. Ry. Co.*, L. R. 4 H. L. 628; *Bargate v. Shortridge*, 5 id. 297. In *Eastern Counties Ry. Co. v. Hawkes*, L. R. 5 H. L. 297, Lord St. LEONARDS said: "I trust that this decision, and the decisions of this house during the present session in the cases of *National Exchange Co. v. Drew*, 2 Macq. 103, and in *Bargate v. Shortridge*, 5 H. L. 297, will place the powers and liabilities of directors and their companies, in making contracts and in dealing with third parties, upon a safe and rational footing. They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established; but they do hold companies bound by contracts duly entered

This species of corporations, for the purpose of carrying on their business and effectuating the same, may sell or pledge their property and borrow money and issue securities therefor,<sup>1</sup> and may mortgage or assign their property to secure or pay their debts;<sup>2</sup> and such

into by their directors for purposes which they have treated as within the objects of their acts, *and which cannot be clearly shown not to fall within them*; and they further hold companies to be bound by a *continued course of dealing by their directors with third persons*, in relation to their shares, although that mode of dealing is contrary to the regulations of their deed of management. I hope that we shall have no other cases before us, where the defence of a company rests upon the want of power to make a contract which the directors deliberately entered into, and under which they took a benefit, or upon the irregularities of their own proceedings." See *Riche v. Ashbury Railway Carriage & Iron Company*, L. R. 9 Exch. 224, and particularly the observations of CHANNELL, B. p. 227, and of BLACKBURN, J. pp. 254, 262, *et seq.*, L. R. 7 H. L. 653; *Mississippi, &c. R. R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Strauss v. Eagle Ins. Co.*, 5 Ohio St. 59; *Morris & Essex R. R. Co. v. Sussex R. R. Co.*, 20 N. J. Eq. 542. In *Chambers v. Manchester & Milford Ry. Co.*, 5 B. & S. 588; 33 L. J. Q. B. 268,—see *South Wales Ry. Co. v. Redmond*, 10 C. B. N. S. 675,—COMPTON, J., held that a "corporation is bound by the seal being affixed to the deed, where the directors have power given them so to affix it, but that it is not bound where the Legislature has said that the thing shall not be done." In *Shrewsbury & Birmingham Ry. Co. v. North Western Ry. Co.*, 6 H. L. 113, Lord CRANWORTH, in delivering the judgment of the House of Lords, considered this to be the more correct way of enunciating the doctrine: "*Prima facie*, a corporation may contract under seal. You must show that the particular contract is one which the corporation has no power to enter into. It must be shown on the face of it to be a breach of duty,—something foreign to the object for which the company was established." So, in *Scottish North Eastern Ry. Co. v. Stewart*, 3 Macq. 382, Lord

WENSLEYDALE said: "There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except when the statutes by which it is created or regulated expressly or by necessary implication prohibit such contract between the parties. *Prima facie*, all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided."

<sup>1</sup> As notes, bills of exchange, &c. *Richards v. Merrimac R. R. Co.*, 44 N. H. 127; *Pierce v. Emery*, 32 id. 484; *Boston, Concord, & Montreal R. R. Co. v. Gilmore*, 37 id. 410; *Black v. Delaware, &c. Canal Co.*, 22 N. J. Eq.; *West v. Madison Co. Agricultural Society*, 82 Ill. 205; *Coe v. Columbus, &c. R. R. Co.*, 10 Ohio St. 372; *Lauman v. Lebanon Valley R. R. Co.*, 30 Penn. St. 42; *Miller v. Rutland & Washington R. R. Co.*, 36 Vt. 452; *Wood v. Bedford, &c. R. R. Co.*, 8 Phila. (Penn.) 94; *Jones v. Guaranty, &c. Ins. Co.*, 101 U. S. 622; *Hendee v. Pinkerton*, 14 Allen (Mass.), 381; *Dupee v. Boston Water Power Co.*, 114 Mass. 37; *Joy v. Jackson P. R. Co.*, 11 Mich. 155; *Frye v. Tucker*, 24 Ill. 180; *Hardy v. Merriweather*, 14 Ind. 203; *Cone v. Smith*, 10 Allen (Mass.), 448; *Kelly v. Alabama, &c. R. R. Co.*, 58 Ala. 489; *Branch v. Atlantic, &c. R. R. Co.*, 3 Woods (U. S. C. C.), 481; *McMasters v. Reed*, 1 Grant (Penn.), 36; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Hamilton v. Newcastle, &c. R. R. Co.*, 7 Ind. 359; *Marion, &c. R. R. Co. v. Hodge*, 9 id. 163; *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414; *Partridge v. Badger*, 25 Barb. (N. Y.) 146; *Wood v. Whelan*, 93 Ill. 153; *Curtis v. Leavitt*, 15 N. Y. 9.

<sup>2</sup> *Pierce v. Emery*, 32 N. H. 484; *Commissioners, &c. v. Troy, &c. R. R. Co.*; *Commonwealth v. Smith*, 10 Allen (Mass.), 448; *Shaw v. Norfolk, &c. R. R. Co.*, 5 Gray (Mass.), 162; *Lenox v. Roberts*, 2 Wheat. (U. S.) 373; *Dana v. Bank U. S. 5 W. & S. (Penn.) 223*; *State v. Bank*

mortgage may not only create a lien on the existing property of the corporation, but by its terms be made to cover subsequently acquired property, which it may be necessary for them to acquire, in the prosecution of their legitimate business.<sup>1</sup> But frequently this right is expressly provided for by statutes.<sup>2</sup> And generally, they may lawfully do any and every act which is necessary to their existence which is not expressly prohibited. While they cannot generally be made directly liable upon a contract which is *ultra vires*, yet they must account for all the benefits which they have received under it whether the contract is executed or executory. As to executory contracts which are *ultra vires*, they cannot generally be enforced at law, except in cases where they have received benefits under the contract, so that they cannot place the other party in *statu quo*; and they are therefore estopped from setting up this defence.<sup>3</sup>

**SEC. 180. Contracts made before Organization.**—Where the promoters of a railway company enter into a contract with a third party to render certain services, or supply certain materials to the company, which services are rendered or materials are furnished, and

of Md., 6 G. & J. (Md.) 205; Hopkins v. Gallatin Turnp. Co., 4 Humph. (Tenn.) 403; *Ex parte* Conway, 4 Ark. 304; Haxtun v. Bishop, 3 Wend. (N. Y.) 13; De Ruyter v. St. Peter's Church, 3 Barb. Ch. (N. Y.) 119; s. c., 3 N. Y. 238; Flint v. Clinton Co., 12 N. H. 431; Warner v. Mower, 11 Vt. 385. It is immaterial whether the instrument is a mortgage or trust deed. Whitewater, & Co. v. Vallette, 21 How. (U. S.) 414; Pullan v. Cincinnati, & Co. R. R. Co., 4 Biss. (U. S. C. C.) 35; Coe v. McBrown, 22 Ind. 252; Coe v. Johnson, 18 id. 218. But see *In re* York, & Co. R. R. Co., 50 Me. 552.

<sup>1</sup> Dunham v. Cincinnati, & Co. R. R. Co., 1 Wall. (U. S.) 254; Galveston, & Co. R. R. Co. v. Cowdrey, 11 id. 483; United States v. New Orleans, & Co. R. R. Co., 12 id. 362; Railroad Co. v. Soutter, 13 id. 517; Pennock v. Coe, 23 How. (U. S.) 117; Williamson v. New Albany, & Co. R. R. Co., 1 Biss. (U. S. C. C.) 198; Morrill v. Noyes, 56 Me. 458; Haven v. Emery, 33 N. H. 66; Seymour v. Canada, & Co. R. R. Co., 25 Barb. (N. Y.) 284; Stevens v. Buffalo, & Co. R. R. Co., 31 id. 590; Buffalo, & Co. R. R. Co. v. Lampson, 47 id. 533; Benjamin v. Elmira, & Co. R. R. Co., 49 id. 446; Fish v. Potter, 2 Abb.

Ct. App. Dec. (N. Y.) 138; Stevens v. Watson, 4 id. 302; Philadelphia, & Co. R. R. Co. v. Woelpper, 64 Penn. St. 366; State v. Northern Cent. R. R. Co., 18 Md. 193; Ludlow v. Hunt, 1 Disb. 552; Coe v. McBrown, 22 Ind. 252; Pierce v. Milwaukee, & Co. R. R. Co., 24 Wis. 551. But compare Howe v. Freeman, 14 Allen (Mass.), 566; Moody v. Wright, 13 Met. (Mass.) 17; Coe v. Columbus, & Co. R. R. Co., 10 Ohio St. 372; Brainerd v. Peck, 34 Vt. 496; Bath v. Miller, 53 Me. 368; Williamson v. New Jersey, & Co. R. R. Co., 25 N. J. Eq. 13; Pierce v. Emery, 32 N. H. 484; Farmers', & Co. v. Commercial Bank, 11 Wis. 207; Jessup v. Trustees, 14 Iowa, 572; Phillips v. Winslow, 18 B. Mon. (Ky.) 430.

<sup>2</sup> If a railroad has authority to borrow money and execute such securities as it may deem expedient, it may mortgage its road and franchises, and all of its property of every kind, including future acquisitions and earnings. Pierce v. St. Paul, & Co. R. R. Co., 24 Wis. —.

<sup>3</sup> Whitney Arms Co. v. Barlow, 63 N. Y. 62; Ohio, & Co. R. R. Co. v. McCarthy, 96 U. S. 258; Darst v. Gale, 83 Ill. 136; Perkins v. Portland, & Co. R. R. Co., 47 Me. 573.

*the corporation when formed has the benefit thereof*, the corporation is liable upon the contract.<sup>1</sup> Thus, in a late case,<sup>2</sup> the plaintiff, a manufacturer of machinery, was applied to by the defendants, who claimed to be the prudential committee of a corporation organized under the laws of Michigan, to manufacture for and ship to the corporation certain machinery. The plaintiff accepted the order by a letter addressed to the corporation under its corporate name. A corporation had been formed, but at the time the order was given the certificate of incorporation had not been filed with the county clerk. Such filing is required by law before a corporation is authorized to commence business. The certificate was afterwards filed. The defendants, at the time of giving the order, had been appointed prudential committee by the shareholders of the corporation and had been authorized by such shareholders to order this machinery. It was held that the corporation was liable for the machinery, and the defendants individually were not, and this notwithstanding that the machinery was charged by the plaintiff to the defendants individually, and was so shipped to them. The agreement was originally made with the corporation, and it could not be afterward changed by either of the parties without the consent of the other.<sup>3</sup> The fact that the corporation at the date of the order was forbidden to do business, would not affect the result, as it subsequently ratified the contract by recognizing and treating it as valid. This made it in all respects what it would have been if the requisite corporate power had existed when it was entered into. The corporation having assumed by entering into the contract with the plaintiff to have the requisite power, both parties are estopped to deny it. The restriction imposed by the statute was a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the State could object. The contract is valid as to the plaintiff and he has no right to raise the question of its invalidity.<sup>4</sup> But there must be a contract express or implied,<sup>5</sup> and a liability is not

<sup>1</sup> Little Rock, &c. R. R. Co. v. Fort Smith R. R. Co., 37 Ark. 164.

<sup>2</sup> Whitney v. Wyman, 101 U. S. 392.

<sup>3</sup> Utley v. Donaldson, 94 U. S. 29.

<sup>4</sup> National Bank v. Mathews, 98 U. S. 621.

<sup>5</sup> A company was formed for the purpose of purchasing M.'s business, and the articles provided that all expenses incurred in the formation of the company

should be paid by it. M. had employed P. as his solicitor in the formation of the company, and after its formation he acted as its solicitor, M. being one of the directors. At a meeting of the directors, M. being present, P. asked that his costs might be paid, and the chairman said they were all agreed that the company would pay these costs; but nothing concerning this appeared on the minutes. At a later

incurred from the simple circumstance that the corporation had the benefits, where there is nothing else from which a contract to pay can be implied. But in order to recover in an action at law against a corporation for services rendered before its existence, *the plaintiff must show either an express promise of the new company, or that the contract was made with persons then engaged in its formation and taking preliminary steps thereto, and that it was made on behalf of the new company, in the expectation on the part of the plaintiff, and with the assurance on the part of the projectors, that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it.*<sup>1</sup> And where a company, supposing itself to be incorporated, issued paper in its corporate name, but afterwards finding that it was not properly organized, dissolved, and was legally incorporated under a different name, it was held that it could not repudiate its paper.<sup>2</sup>

Necessary services rendered by a person at the request of the promoters of a corporation before its organization, and of which the corporation receives and accepts the benefits and advantages, may be recovered for as upon an implied promise by the corporation. Thus,

meeting a resolution was passed on the proposal of M. that a check should be given to P. to discharge a certain part of these costs. The company being afterwards wound up, P. carried in a claim for his bill of costs, but the taxing master disallowed all items incurred before the formation of the company. *Bacon, V. C.*, affirmed his decision. It was held that P. having been retained by M., the company were not bound to pay for his services, though they had had the benefit of them; also that there was not evidence of an agreement by the company to pay P. *LINDLEY, L. J.*, said: "If he had brought this action against the company with no materials except proof that he had done the business, and the provisions in the articles, he could not have succeeded. This is shown by many cases, among which I may refer to *Eley v. Positive Government Security Life Assurance Company*, 34 L. T. Rep. (N. S.) 190; 1 Ex. Div. 20, 88, where it was held that articles of association do not constitute a contract between the company and an outsider. A provision in act of Parliament may enable an out-

sider to sue. There is in such a case a statutory obligation of which the person named can take the benefit, an action for debt on a statute being a well-known old form of action at common law; but an agreement between A. & B. that B. shall pay C. gives C. no right of action against B. I cannot see that there is in such a case any difference between equity and common law; it is a mere question of contract. It is said that Mr. Pease has an equity against the company because the company has had the benefit of his labor. What does that mean? If I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done by somebody else he is liable to pay the person who did the work." *Matter of Rotherham Alum & Chemical Co.*, 50 L. T. Rep. (N. S.) 219.

<sup>1</sup> *Little Rock & Fort Smith R. R. Co. v. Perry*, 37 Ark. 164.

<sup>2</sup> *Empire Mfg. Co. v. Stuart*, 46 Mich. 482.

in a New Hampshire case,<sup>1</sup> where the plaintiff at the request of one or more of the incorporators rendered services in securing subscriptions to the stock of the corporation, of which the corporation when organized availed itself, it was held that an action of assumpsit could be maintained therefor. In England, where promoters of a railway, who were about to solicit acts of incorporation, agreed with proprietors over whose land the railway was destined to pass, and who were intending to oppose the granting of such acts of incorporation, to pay them a certain sum for the lands to be taken, and also certain residential damages if they would withdraw their opposition, it was held that, as the opposition was withdrawn upon the faith of these agreements, the corporation was in equity bound to perform its agreement.<sup>2</sup> How far this doctrine, in similar cases, would be

<sup>1</sup> *Low v. Conn. & Pass. River R. R. Co.*, 45 N. H. 375. Where there is no proof of acceptance by the corporation, services rendered and expenses incurred therefor before its organization will be presumed to have been gratuitous, in view of the general good or private benefit expected to result from the object of the corporation. *Rockford, &c. R. R. Co. v. Sage*, 65 Ill. 328; *Safety Deposit, &c. Co. v. Smith*, id. 309; *Western Screw, &c. Co. v. Cousley*, 72 Ill. 531. Pending an attempt to organize a corporation under the general law of the State, and after a part of the stock was subscribed, the subscribers to the stock held a meeting, and employed a superintendent to work for the proposed corporation, which he commenced; but afterwards, when it was ascertained that the requisite subscription of stock could not be obtained, he ceased work. Most of the same persons afterwards united to form another company, with a capital stock of one-half the amount of the former proposed company, for the same purpose, and completed their organization and incorporation. It was held that, even if the first company had completed its organization, the superintendent could not have recovered against it for his services, much less against the new company. *Western Screw, &c. Co. v. Cousley*, 72 Ill. 531. Although it may be that where a number of persons not incorporated are informally associated for a common object, and intend to procure a

charter, they may authorize acts to be done in furtherance of their object by one of their number, with the understanding that he shall be compensated therefor by the company when fully formed; and if such acts are necessary to the organization and its objects, and are accepted by the corporation and the benefits enjoyed by it, they must be taken *cum onere* and be compensated for; yet the persons authorizing such acts, to bring them within this rule, must be a majority of the promoters of the enterprise; a minority cannot bind the association or corporation. *Bell's Gap. R. R. Co. v. Christy*, 79 Penn. St. 54. Where several persons unite in an enterprise for the purchase of land with a view to the establishment of a mining company, which subsequently proves unsuccessful, one of the parties cannot claim from the others repayment for advances because of a clause in the agreement providing "for repayment of all sums advanced by him." Unless the other associates agree to repay the advances, the words quoted are to be construed as meaning that he is to be repaid out of the land or its proceeds. *Bell v. McAboy*, 3 Brews. (Penn.) 81.

<sup>2</sup> *Preston v. Liverpool, &c. Ry. Co.*, 7 Eng. L. & Eq. 124. The promoters of a railway company contracted with a landowner, being a peer of Parliament, to pay him £20,000 personally, for his countenance and support in obtaining its act, such sum to be independent of the ordi-

adopted in this country is questionable, as it might be regarded as opposed to public policy. But there would seem to be a wide distinction between a contract the direct object and purpose of which is to influence legislation by influences to be brought to bear directly upon the members of the legislative body,<sup>1</sup> and one which merely seeks to obviate or remove the objections to certain legislation, which rest entirely in the circumstance that such legislation would result in pecuniary injury to the contracting party. It is upon the latter ground that the doctrine of the English cases rests, and we fail to see how, under such circumstances, such a contract can be said to be in violation of any rule of morality or public policy. Indeed, the general rule adopted in this country is, that contracts which simply contemplate the use by a person of proper means and influences to secure the adoption or rejection of a measure by a legislative body, and when no improper means are in fact resorted to, are not void as being illegal or opposed to public policy.<sup>2</sup> Contracts made with corporations, after their charter but before their organization, have been enforced in favor of corporations after their organization in numerous instances. Under this head are contracts to take and pay for shares of its stock,<sup>3</sup> in which it has been held that such subscribers were liable, even before the organization of the company, for assessments to pay preliminary expenses incurred in obtaining the act of incorporation, as well as in ascertaining whether the enterprise is practicable.<sup>4</sup>

nary payment for land, severance, and other usual compensation. After the passing of the act the directors of the company, when formed, ratified the contract; but having doubts whether, under the Lands Clauses Act, the land-owner was entitled to the money personally, they covenanted by deed to pay interest upon the amount, which was to be retained by the company or paid into court. A separate agreement stipulated for the quantity of land to be taken for the railway, and the amount to be paid by the company. It was held that the original contract, and the contract by the directors after the formation of the company to pay a sum of money for countenance and support previously given in procuring the act, were *ultra vires* of the company, and could not be enforced against the company as payment of expenses of obtaining

the act, under the sixty-fifth section of the Companies Clauses Act, or otherwise. *Earl of Shrewsbury v. North Staffordshire Ry. Co.*, L. R. 1 Eq. 593.

<sup>1</sup> *Powers v. Skinner*, 34 Vt. 274.

<sup>2</sup> *Trist v. Child*, 21 Wall. (U. S.) 441; *Rose v. Truax*, 21 Barb. (N. Y.) 361. See *Wood's Law of Master and Servant*, Sec. 216, p. 427, for a full review of the cases.

<sup>3</sup> *Salem Mill Dam Co. v. Ropes*, 6 Pick. (Mass.) 23; *Chester Glass Co. v. Dewey*, 16 Mass. 94.

<sup>4</sup> *Kennebec, &c. R. R. Co. v. Palmer*, 34 Me. 366; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; *Vt. Central R. R. Co. v. Cloyes*, 21 Vt. 30; *Gleaves v. Turnpike Co.*, 1 Sneed (Tenn.), 491; *Lake Ontario R. R. Co. v. Mason*, 16 N. Y. 451; *Tonica, &c. R. R. Co. v. McNeely*, 21 Ill. 71.



**SEC. 181. Liable as Lessee.** — A railway company may lease lands or buildings for its use, even by parol, and is liable for the rent thereof in an action for use and occupation, and is subject to the same liabilities and remedies that an individual would be.<sup>1</sup>

**SEC. 182. Contract to haul certain Quantity of Freight per Month, or at certain Rates.** — A contract between a railroad company and an individual, that if he will open a certain business upon the line of their road they will haul not less than a certain quantity of freight for him each month, is valid and binding. Thus where a party has established a brick-yard, and expended a large sum of money upon an agreement with a railway company to furnish transportation for not less than sixty thousand bricks per week, and the contract has been violated by the company, and suit has been brought for damages for the breach of the agreement, the damages are not the difference between the expenditures, with interest, less the receipts and value of the property deducted therefrom; as the plaintiff may have made unnecessarily large investments, for which it would be unjust to compel the company to pay; and the recovery must be limited to the actual loss resulting from the breach. Without, however, attempting to define the true rule relative to the measure of recovery, the court awarded \$7500 as damages.<sup>2</sup>

In an Illinois case,<sup>3</sup> the proprietors of a coal company built a railway twelve miles long and sold it to a railway company, which on the same day turned the road over to another railway company. The latter corporation operated the road for several years, during which it complied with the terms of a contract between the first purchaser and the builders, in relation to carriage of coal. It was held that the corporation operating the road, having recognized the contract, was bound by its terms.

**SEC. 183. Contract to build Bridges, Cattle-Passes, &c.** — A contract of a railroad company to build a bridge over its road at a given point within one year after the completion of the road imposes no obligation on the company to complete its road within any given period or within a reasonable time, and the other party to the contract cannot recover for a failure of the company so to do.<sup>4</sup>

Where a railroad company, in consideration of the grant of a right of way over real estate, covenanted with the owners of the

<sup>1</sup> *Lowe v. London, &c. Ry. Co.*, 18 Q. B. 632.

<sup>2</sup> *Harrison v. New Orleans, Jackson, &c. R. R. Co.*, 28 La. An. 777.

<sup>3</sup> *Chicago & Alton R. R. Co. v. Chicago Vermillion, &c. R. R. Co.*, 79 Ill. 121.

<sup>4</sup> *St. Louis, Jacksonville, & Chicago R. R. Co. v. Lurton*, 72 Ill. 118.

land, their heirs and assigns, to construct a drawbridge on its track at a certain point, and maintain the same, so as to admit vessels from a river through a contemplated slip or canal, and it appeared that, owing to an agreement made by certain owners of the land afterwards, the slip or canal to the river could not be made continuous, so as to be of avail for canal purposes to the complainants, who had succeeded to a part of the land ; so that a drawbridge would not subserve the end designed by the original contract, and the effect of specifically enforcing the agreement would be to seriously embarrass the railway company in its business, delay trains, and endanger their safety, and from the large number of cars and locomotives daily passing over the bridge, would be a serious public detriment, — a decree of specific performance against the company was refused.<sup>1</sup>

A written contract was entered into to build a bridge which was not described. It was held that it might be shown by parol that, at the time of the contract, the parties referred to a plan or draft of a bridge then in existence.<sup>2</sup> A contract with a railway company, embodied in a deed for the right of way, provided for the construction of a cattle-pass by the company, but fixed no time therefor ; it was held that the company had a reasonable time after the completion of the road in which to build it.<sup>3</sup>

**SEC. 184. Contracts as to Location of Stations.** — There is a class of contracts which are void because they are contrary to the interests of the public to such an extent that they are opposed to public policy ; and of this class are those which bind a railroad company to do an act which is calculated to prevent it from doing that which the public interests require that it should do. To this class belong those by which a railroad company binds itself to maintain a depot at a certain point, *and at no other*, in a certain town or city. Thus, in an Illinois case,<sup>4</sup> one Mathers conveyed two hundred lots in the town of Ashland to trustees for a railroad company, on

<sup>1</sup> *Chicago & Alton R. R. Co. v. Schoeneman*, 90 Ill. 258.

<sup>2</sup> *Sandford v. Newark & Hudson R. R. Co.*, 37 N. J. L. 1.

<sup>3</sup> *Livingston v. Iowa Midland R. R. Co.*, 35 Ia. 555.

<sup>4</sup> *St. Louis, &c. R. R. Co. v. Mathers*, 71 Ill. 592. In *Williamson et al. v. Chicago, Rock Island, & Pacific R. R. Co.*, 53 Iowa, 126, a railroad company, in consideration of the conveyance of certain

lands to it for depot purposes in the city of D., agreed with plaintiffs, who conveyed the lands, that it would erect no depot in said city but upon such lands. It erected a depot upon the lands, and also another in a different part of the city. It was held that the contract was void as against public policy, and that plaintiffs could not maintain an action for damages caused by the breach of it by the railroad company.

condition that it should build no station within three miles of Ashland. Upon the breach of this condition, Mathers commenced an action to compel a reconveyance of the property. The court said: "The alleged agreement or condition, on account of the non-performance of which relief is here sought, was that a railroad company, chartered by an act of the legislature, and invested with the power of condemning private property, upon the ground that its road is for the public use, shall not establish a depot or station within three miles of Ashland. It cannot be pretended for a moment that the board of directors had authority to make such an arrangement or condition. They were trustees both for the public and the stockholders of the company, and in the discharge of their twofold duty were required to act with reference to the public convenience, on the one hand, and the private interests of the stockholders, upon the other. The interests . . . both of the stockholders and the public forbid that there should be a positive prohibition against the establishing of stations at any points on the line of the road. Whenever the public commerce requires that a station on a railroad should be established at a particular place, and it can be done without detriment to the interests of the stockholders of the company, the law authorizes it to be established, and no contract between a board of directors and individuals can be allowed to prohibit it. The appellee stands *in pari delicto* with the board of directors, so far as this agreement or condition is concerned. He voluntarily, according to his own showing, contracted for this breach of trust toward the stockholders of the railroad company, and breach of duty to the public at large. Their loss was to be his gain. He was willing, at whatever expense it might be to others, to purchase a monopoly whereby to enrich himself, and having failed to accomplish his purpose, now asks a court of equity to reinstate him in the condition he was in before entering into this unlawful combination. The case presents no facts or circumstances meriting the consideration of a court of equity."

In Kansas,<sup>1</sup> an action was brought by a land-owner for the breach of a written contract, in which the company agreed to place a depot on land conveyed to it by the plaintiff, and not at any other time to have or use any other depot within three miles of said depot. The court said: "Railroad corporations are, as we have seen, public agencies, and perform a public duty. They are agencies created by

<sup>1</sup> St. Joseph & Denver City R. R. Co. v. Ryan, 11 Kans. 602.

the public, with certain privileges, and subject to certain obligations. A contract that they will not discharge, or by which they cannot discharge those obligations, is a breach of that public duty, and cannot be enforced. . . . It is the duty of a railroad company to furnish reasonable depot facilities. The number and location of the depots, so as to constitute reasonable depot facilities, vary with the changes and amount of population and business. A contract to leave a certain distance along the line of the road destitute of depots is in contravention of public policy."

Some courts have held that an agreement between an individual and a railroad company for the location of a depot at a particular place, without reference to the question whether it is exclusive or not, in consideration of money or property, is against public policy, and void.<sup>1</sup>

But the weight of authority sustains the validity of contracts for the location of a depot at a certain point, where the company does not bind itself not to establish other stations in the same vicinity or elsewhere on the line as the convenience of the public may require.<sup>2</sup>

<sup>1</sup> *Pacific R. R. Co. v. Seely*, 45 Mo. 212 ; *Marsh v. Firbury*, P. & U. W. R. R. Co., 64 Ill. 414 ; *Bestor v. Wathen*, 60 id. 138 ; *Fuller v. Dame*, 18 Pick. 472 ; *Halladay v. Patterson*, 5 Oregon, 177.

<sup>2</sup> *Currier v. Railroad Co.*, 48 N. H. 326 ; *Williamson v. Chicago, &c. R. R. Co.*, *ante*; *Kinealy v. St. Louis, &c. R. R. Co.*, 67 Mo. 658 ; *Halladay v. Patterson*, 5 Oregon, 177 ; *Mortindale v. Kansas City, &c. R. R. Co.*, 60 Mo. 510 ; *Texas, &c. R. R. Co. v. Robard*, 60 Tex. 545 ; 48 Am. Rep. 268. Where land was conveyed to a railway company in consideration of the company placing the depot for Prescott upon the grantor's land, and the station was built and maintained for over twenty years, it was held that the grantor, upon the company ceasing to maintain the depot there, was entitled to damages, or a restitution of the land. *Jessup v. Grand Trunk Ry. Co.*, 28 Grant's Ch. (U. C.) 583. See also *Wallace v. Gt. Western Ry. Co.*, 25 id. 86. And the agreement is equally binding upon a lessee of the road. *Wallace v. Gt. Western Ry. Co.*, 3 Ont. App. Rep. 44. See also *Georgia R. R. Co. v. Reeves*, 64 Ga. 492. One who executed an absolute grant of the right of way to a railway company, in consideration of one dollar paid,

and of enhanced value to result to his property by the construction of the road, claimed damages for the breach of a collateral verbal agreement by which a terminal depot should be established at a particular point, which was not done ; it was held that the measure of his damages would have no relation to the value of the land, but would be determined by the injury to the grantor caused by the erection of a depot at another point, and the failure to deliver passengers and freight at the point agreed on for a terminal depot. *Galveston, &c. R. R. Co. v. Pfeuffer*, 56 Tex. 66. In 1870, the defendants, in consideration that the Montclair R. R. Co. would construct a depot on the premises, and stop a specified number of daily trains there for ten years, and build the fences along the track, agreed in writing to convey to the company the lands necessary for its track and depot. The company took possession at once, and built its track, but nothing more. In 1875, under the foreclosure of a mortgage, all of the Montclair Company's property was sold, and a new company organized. In 1878, under a foreclosure against the latter company, all of its property was sold, and another company formed. After the com-

Thus, in a Texas case,<sup>1</sup> the defendant road entered into a contract with the plaintiff, in consideration that he would build and open a hotel at a certain place, that it would convey to him certain land at that place, and would maintain a permanent station there, and

plaintain had been incorporated, the defendants began an ejectment at law to recover their lands, and this action was enjoined by complainant and relief in equity sought. The defendants answered, protesting against the specific performance of their contract, and expressing willingness to convey the premises to complainant, on receiving compensation therefor and damages assessed as of the date when the Montclair Company took possession. It was held that they were equitably entitled to have their compensation and damages so estimated. *New York & Greenwood Lake R. R. Co. v. Stanley*, 34 N. J. Eq. 55. In a Mississippi case, R. conveyed to a railroad company twenty-two acres of land, upon condition subsequent that the company should locate its track and depots as specified in the deed. Afterwards it was agreed by parol between R. and the president and chief engineer of the company that the track and depots should be located differently, that the company should reconvey to R. the twenty-two acres, and that R. should convey to the company six acres, a part of the twenty-two. The six acres were marked off in a map made by the company, as its property, and the track and depots located thereon according to the last agreement. R. afterwards applied to the president of the company for a conveyance. He declined to make it until it was ascertained how much of the twenty-two acres another connecting railroad company might need for depot purposes, stating that then all not so needed would be reconveyed. He told R., however, to go ahead and make sales of town lots, parts of the property, and the company would convey to his vendees. Upon the president's death, R. brought this agreement to the notice of his successor, who recognized it, and promised that it should be carried out. R. laid off town-lots on the sixteen acres, and sold many, which were afterwards improved. The company's officers were aware of these sales, and saw the improvements being

made. In a subsequent controversy between R. and the company, the latter asserted its right to the whole twenty-two acres, denying the authority of its president and chief engineer to make the agreement to reconvey, and insisting that it was void, because not in writing. It was held that the company was estopped to deny the authority of its own officers, and that R. was entitled to all the land except the six acres. It was held, also, that R., by the agreement aforesaid, had waived, as to the six acres, his right to a forfeiture for non-compliance by the company with the condition in the deed. *Vicksburg & Meridian R. R. Co. v. Ragsdale*, 54 Miss. 200. Erecting a station without providing the proper agents is not a performance of such a contract. *Wallace v. Gt. Western Ry. Co.*, 25 Grant's Ch. (U. C.) 866. But if the contract is to place upon such land *a part* of the depot buildings, it is performed by placing thereon a warehouse for receiving freight, and the usual facilities for loading and unloading it. *Pittsburgh, &c. R. R. Co. v. Rose*, 24 Ohio St. 219. The remedy by specific performance will be denied, unless the contract is specific as to the location and kind of station to be erected, and generally the better remedy is for damages. *Wilson v. Northampton, &c. Ry. Co.*, L. R. 9 Ch. 279. But see *Hubbard v. Kansas City, &c. R. R. Co.*, 68 Mo. 68, where it was held that either remedy might be pursued. But he cannot maintain trespass or ejectment. See also *Kansas Pacific R. R. Co. v. Hopkins*, 18 Kan. 494, as to instances in which damages are recoverable. For instances in which a court of equity will compel a company to furnish a better station, on a bill brought by a land-owner under such a contract, see *Hood v. North Eastern, &c. Ry. Co.*, L. R. 8 Eq. 666; where it will not, see *Hood v. North Eastern Ry. Co.*, L. R. 5 Ch. 525.

<sup>1</sup> *Texas, &c. R. R. Co. v. Robard*, 60 Tex. 545.

would give the proprietors the patronage of the company, and dissuade all others from erecting hotels there. The contract was held valid and binding upon the company. In the course of his opinion, WATTS, J., very sensibly remarked: "There is a distinction between contracts *not authorized* by law, and those which are *prohibited* by law; the former only are properly denominated by the term *ultra vires*." After referring to the fact that much confusion exists in the cases as to the law relative to the effect of *ultra vires* acts, he continues, "Much of this confusion perhaps has been occasioned by the fact that courts of last resort have looked more to reported cases than to those under consideration." To these expressions we lend our hearty assent; and if courts, instead of attempting to follow apparently vague, indefinite, and contradictory statements of the law as laid down by courts in questions of this character, will apply to the facts of the case in hand the ordinary rules of law applicable thereto, interlarded with a little common-sense, there will generally be found but little difficulty in arriving at satisfactory results.

Where land is conveyed in trust for the benefit of a railroad company, in consideration of the illegal agreement of the company not to establish any depot or station within three miles of a certain place on its road, and the trustee afterward reconveyed the property back to the grantor, it was held that the company could not maintain a bill to have the lots sold for its benefit, and have the same again conveyed to a trustee for its benefit, nor could it claim the right to have the taxes paid on the lots made a charge thereon for its reimbursement.<sup>1</sup>

SEC. 185. **Contracts Relating to Refreshment-Rooms.**—A lease by a railway company of premises upon its line, to be used as a refreshment-room, with a provision that all passenger trains shall be stopped there for a reasonable period, of about ten minutes, except trains not under the control of the company, is valid and binding, and will be specifically enforced; but where the company carries the mails, and the Postmaster-General, under a statute giving him that power, requires the company to run a train at a certain hour, stopping at the station *five* minutes only, the contract is not thereby broken, because it is a train not under the control of the company. But the rule would be otherwise where the statute did not give the Postmaster-General such authority, but the matter rested wholly in contract.<sup>2</sup>

<sup>1</sup> St. Louis, Jacksonville, & Chicago R. R. Co. v. Mathers, 104 Ill. 257.

<sup>2</sup> Phillips v. Great Western Railway Co., L. R. 7 Ch. 409. In Flanagan v.

In another English case, in a declaration in covenant, the plaintiffs stated that the defendant demised to them certain refreshment-rooms at Swindon for ninety-nine years, at the yearly rent of 1*l.*, and that the plaintiffs covenanted to complete, keep in repair, and insure the said rooms; that the defendant covenanted that, in case the rooms should be disused as the regular and general place of stoppage for the refreshment of passengers, it would purchase the buildings of plaintiffs on certain terms; that it was by the said indenture declared to be the intention of defendant, and the understanding of the plaintiffs, that all trains conveying passengers,—not being goods trains, or trains to be sent express or for special purposes, or trains not under the control of the defendant,—which should pass the Swindon station, up or down, should stop there for refreshment of passengers for a reasonable time, of about ten minutes, and that the defendant covenanted and agreed with the plaintiffs not to do any act which should have an effect contrary to the above intention. The breach

Great Western Railway Co., L. R. 7 Eq. 116, a railway company entered into an agreement under seal to grant to A. a lease for ninety-nine years of the hotel to be erected at a certain station in X., with powers for the company to determine the lease if any complaint as to the mode of carrying on the business should not be remedied within three months after notice of such complaint. It was also agreed that the lessees “should have the occupation of the refreshment-rooms at X. station, subject to the same restrictions and provisions as relate to the carrying on the business of the hotel, both as regards the quality and prices of provisions, and management thereof.” The lease granted in pursuance of this agreement was confined to the hotel, and contained no mention of the refreshment-rooms. The refreshment-rooms on the up line, adjoining the hotel, had been always occupied with it. In 1849, B., a director of the company (head of a firm at X., who were assignees of the lease of the hotel) erected, at a cost of £200, refreshment-rooms on the down line, pursuant to an alleged agreement with the company that his firm should have a lease of such refreshment-rooms for a term co-extensive with the lease of the hotel. The only evidence of such agreement was this minute in the books

of the company: “A ground rent of £6 per annum was ordered to be fixed for the new refreshment-rooms built by the lessees at the down station in X.” In 1867 the company gave notice to C., the assignee from B. of the lease, and occupier of both refreshment-rooms, that its arrangements with reference to a new station (recently erected) at X. would involve the determination of his tenancy of the existing refreshment-rooms. It was held, 1. As to the refreshment-rooms on the down line, that no agreement of which the specific performance could be granted was proved, and that in any case the court could not enforce specific performance of an agreement by a director with the company for the benefit of himself or his firm. 2. As to the upper refreshment-rooms, that the occupation was not determinable at the mere will of the company, and that C. was entitled to have the agreement of 1840 carried into effect by having a deed executed to him as the assignee of A., with all proper provisions, granting the right of occupation of the upper refreshment-rooms to him, his assigns and nominees, being tenants of the hotel, subject to the provisions and restrictions contained in the agreement. *Flanagan v. Great Western Railway Co.*, L. R. 7 Eq. 116.

alleged was that, whilst the Swindon station was used as the regular and general place of stoppage for refreshment of passengers, the defendant caused trains carrying passengers, — being trains under the control of the defendant, and not express trains, etc., — to pass the Swindon station, both up and down, without stopping there for the refreshment of passengers for a reasonable period, of about ten minutes or any other reasonable period, and caused the trains to stop there for a short and unreasonable period, to wit, one minute and no more, not being sufficient to enable the passengers to obtain any refreshment there. It was held, on demurrer, that the declaration of the above intention, taken in conjunction with the rest of the indenture, amounted to an absolute covenant by the defendant that the arrangement for trains to stop at Swindon should continue as long as the company chose to make it the general place of stoppage for refreshment; and that a good breach was assigned.<sup>1</sup>

**SEC. 186. Free passes, Contract to give.** — A contract based upon a good consideration to give a person, or a person and his family a free pass over its road during the life of such person, is valid and binding, and the party may upon the refusal of the company to perform the contract, proceed in equity for a specific performance;<sup>2</sup> or by an action for damages.<sup>3</sup> An agreement between two companies by which a railway company agrees to furnish passes for certain officers, and employes, is valid.<sup>4</sup> But a mere naked agreement to give a person a pass for life is *nudum pactum*, and not enforceable.

**SEC. 187. Contract to stop Trains at a certain Place.** — A contract entered into by a railroad company upon good consideration to stop its trains at a certain place so long as its road exists, is valid and binding. Thus, where a deed for right of way expressed the consideration and condition to be that the railway company should build, and forever maintain, a switch to a mill on the land, it was held that this was a covenant real and runs with the land.

If an intermediate owner of the mill had agreed to release the railroad company from building and maintaining such switch, and the company in consideration thereof had agreed to stop at specified times its freight trains at the door of such mill for its accommoda-

<sup>1</sup> *Rigby v. Great Western Railway Co.*,  
4 Eng. R. R. & Canal Cases, 190; 14 M.  
& W. 811.

<sup>2</sup> *Bettridge v. Great Western Railway*  
Co., 3 Grant (U. C.), 58.

<sup>3</sup> *Erie, &c. R. R. Co. v. Douthet*, 88  
Penn. St. 243.

<sup>4</sup> *Niagara Falls Bridge Co. v. Great*  
*Western Railway Co.*, 25 U. C. (Q. B.)  
313.



tion, a subsequent owner could have this modified contract specifically enforced by a court of equity, but he could not sue upon it at law; but if such contract was made by the plaintiff instead of by an intermediate owner of the mill, he might sue upon it at law.<sup>1</sup> And a court of equity will restrain a breach of such a contract.<sup>2</sup>

**SEC. 188. Guaranty of Bonds of other Railroad Corporations.**—As the bonds of railroad corporations are negotiable securities by the usages of trade, and as a railroad corporation may indorse such securities in the due course of business, it is held that, even if there is no authority conferred upon it to do so by its charter or the general statutes, the guaranty by one railroad company of the bonds of another company will be binding upon it in favor of *bond fide* holders thereof.<sup>3</sup> Where the statute confers express authority upon

<sup>1</sup> Lydick v. Baltimore & Ohio R. R. Co., 17 West Va. 427.

<sup>2</sup> Lindlay v. Great Northern Railway Co., 17 Jur. 522.

<sup>3</sup> In *Arnat v. Erie R. R. Co.*, 5 Hun (N. Y.), 608; affirmed 67 N. Y. 315. The defendant was an existing railroad corporation, created by the laws of this State, owning and operating a railroad from the cities of New York and Newburgh, on the Hudson river, to Lake Erie. The Boston, Hartford, and Erie Railroad Company was also a railroad corporation, which, under the laws of Connecticut, sanctioned by the laws of Massachusetts, owned and operated a railroad from Waterbury, Connecticut, to the city of Boston, and under authority of the laws of New York was authorized to construct and operate a railroad, to connect with said other railroad, terminating at Waterbury, to the Hudson river, at Fishkill, opposite to Newburgh. On the 8th day of October, 1867, these two railroad corporations entered into an agreement, whereby the former agreed to guarantee the semi-annual payment of interest on a certain number of mortgage bonds, to be issued by the latter in consideration that, as soon as any part of its road between Newburgh and Boston was completed and in operation, so as to afford a business connection, all business passing from one road to the other, should be done on joint account, receipts to be apportioned, etc. Upon the strength of said agreement, certain bonds were issued

by the Boston, Hartford, & Erie corporation, as contemplated by said agreement, and the coupons attached to said bonds were guaranteed by the defendant. These bonds and coupons were negotiable. The defendant subsequently became possessed of all the bonds the coupons of which it had guaranteed; and the bonds with the coupons attached and guarantee thereon, now in suit, were by the defendant transferred, for value, to the plaintiff's testator. The coupons were regularly paid as they became due, by the defendant, up to July, 1869. The court say: "The one question presented by this case is the power of the defendant to guarantee the coupons attached to the bond of another railroad corporation. No question is made as to the form of the act, or whether the other corporation had power to enter into the contract which formed the consideration of said act. Neither does the question whether the agreement was wise or unwise enter into the consideration. The defendant's counsel takes the broad ground that any 'contract or undertaking on the part of a corporation beyond the scope and limit of the express and implied powers conferred upon it by law, is illegal and void,' and that such an act as the one in question is not among the express or implied powers of the defendant. The question then is, what powers may be implied as belonging to the defendant corporation. As a railroad, it was authorized to contract for the transporting of freight and

a company to guarantee the bonds of another company, a mere failure on the part of the guaranteeing company to pursue the mode

passengers, — not alone to be taken up and set down upon its own road or within its termini, but to and from any point beyond its road. To that end it has been held that a railroad corporation, for the purpose of furthering and promoting its business traffic, may, unless expressly forbidden or restricted in its charter, contract with other corporations for the use of each other's road, or combine their business, so long as they do not form a copartnership. The English courts have held that an agreement between two railroad corporations, whereby one was given the use of the other's road for a proportion of the rates and fares, allowing one company to fix the rates, is not void. *M. R. Co. v. G. W. R. Co.*, L. R. 8 Ch. App. 841. And so an agreement between two companies to share the profits and expenses, so that the arrangement is not a partnership, is not *ultra vires*. Brice on *Ultra Vires*, 282, 291, and cases cited. In this State such contracts were authorized as early as 1839. A statute of that year enacted that 'it should be lawful thereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract,' etc. This statute has not been repealed expressly or impliedly by any subsequent acts; on the contrary, all subsequent legislation has tended to promote and encourage business connections and interchanges of traffic between railroads, not only in this State, but with other States, when a continuous line can be formed by such connections. In fact, this principle was recognized by an act of Congress, passed in 1866. See U. S. Revised Statutes, p. 1022. The contract between these two corporations must be regarded as made for the purpose, and with the intent of promoting interchanges of traffic and business. It is to be inferred as made in good faith and for the benefit of both. As such combinations are not against public policy, the authority in the defendant to make it should be regarded as among its implied powers. Having the power to do the act,

the manner or form of doing it is not made a question. Neither does the question of performance by the Boston, Hartford, and Erie corporation arise. Having lawfully put its name to negotiable instruments, and they having passed into the hands of third parties for value, the defendant cannot shelter itself under a non-performance by the other party. Assuming the defendant had the power to make such contract, it might make its obligation to pay in any form it saw fit. *Curtis v. Leavitt*, 15 N. Y. 9; 35 id. 506; 27 id. 560. Again, as there is nothing in the charter of the defendant prohibiting it from entering into a contract like this with the Boston, Hartford, and Erie Railroad Company, and no steps having been taken by the sovereign power for annulling its charter, it does not lie in its own mouth 'to say that the contract into which it had entered was void, as beyond its capacity. There is another view of this case on which, it seems to me, this judgment should be sustained, irrespective of the question whether the defendant was authorized to guarantee the coupons of another corporation or not. It appears from the case and the findings, that the bonds to which were attached the coupons in suit, with the guarantee thereon, were transferred by the defendant to the plaintiff's testator for value. The defendant had capacity to borrow money or purchase property, and give its obligations in payment, or guarantee obligations of others, held by it, in payment. The defendant, therefore, became liable to plaintiff as upon its own original obligations, irrespective of the origin of the bonds; and it cannot now repudiate that obligation. Having transferred the bonds itself, and received the avails thereof, the corporation must be held as estopped from denying its liability upon its guaranty of the coupons. *Remsen v. Graves*, 41 N. Y. 471; *Bissell v. M. S. & N. I. R. Companies*, 22 id. 258; *Parish v. Wheeler*, 22 id. 494; *St. John v. Roberts*, 31 id. 441. See also *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. (U. S.) 381; *Opydyke v. Pacific R. R. Co.*, 3 Dill. (U. S. C. C.)

specified in the statute will not invalidate such guaranty in the hands of a *bonâ fide* holder.<sup>1</sup>

The rule in reference to this class of securities is that a purchaser is not bound to look beyond the face of the bonds and the mortgage given to secure them, and if there is nothing there to put him on inquiry, he is not bound to look further to ascertain whether there is a defect of authority.<sup>2</sup> There should be a consideration for such guaranty, but a lease of the road to the guaranteeing company has been held sufficient.<sup>3</sup>

**SEC. 189. Power to build Branches, lateral Roads.**—There is no question but that, for the convenience of its customers who have large amounts of freight, a railroad company may build side tracks, or spurs or branches of its road within the limits of the towns through which it is located, provided it can obtain the consent of the land-owners over which its track must be laid; but unless expressly authorized to do so, it cannot extend its line, or exercise the right of eminent domain for the construction of such spurs or branches of its road.<sup>4</sup> But where it builds such spurs or branches for the convenience of its customers, and the development of its business, without special authority, it stands in the same position as an individual would who should build a railroad, upon his own land or under a license from others; and is not protected by its franchises from liability for damages or nuisances resulting therefrom.

If the company is authorized to build branch or lateral roads to mines, quarries, manufacturing establishments or other points within certain limits, it may in the absence of any limitations in that respect, exercise the right, and take lands for such purposes at any time. But the right to construct such railways generally depends upon charter provision and unless power to build them is conferred upon a company by its charter, either in express terms or by necessary implication, they cannot be constructed.<sup>5</sup> And a provision in

55; *Cozart v. Georgia, &c. R. R. Co.*, 54 Ga. 379; *Chicago, &c. R. R. Co. v. Howard*, 7 Wall. (U. S.) 392.

<sup>1</sup> *Madison, &c. R. R. Co. v. Norwich Savings Society*, 24 Ind. 457; *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. (U. S.) 381. But see *Cozart v. Georgia, &c. R. R. Co.*, *ante*.

<sup>2</sup> *Stanton v. Trustees, &c.*, 2 Woods (U. S. C. C.), 523.

<sup>3</sup> *Law v. Pacific R. R. Co.*, *ante*.

<sup>4</sup> *Works v. Junction R. R. Co.*, 5 Mc-

Lean (U. S. C. C.), 425; *Atlantic, &c. R. R. Co. v. St. Louis*, 3 Mo. App. 315; *Pittsburgh v. Penn. R. R. Co.*, 48 Penn. St. 355; *State v. St. Louis, &c. R. R. Co.*; *Attorney-General v. West Wisconsin R. R. Co.*, 36 Wis. 36; *Morris & Essex R. R. Co. v. Central R. R. Co.*, 31 N. J. L. 205.

<sup>5</sup> *Morris & Essex R. R. Co. v. Central R. R. Co. of N. J.*, 42 N. J. L.; *New Orleans & Carrollton R. R. Co. v. Second Mun. of N. O.*, 1 La. An. 128; *Knight v. Carrollton R. R. Co.*, 9 La. An. 284.

a charter that all railroad companies shall have the right to run upon equal terms over the track of the company in question, does not authorize the construction of a branch to enable a certain other railroad company to enjoy the privilege granted by the charter.<sup>1</sup> Where a railroad company was authorized by its charter "to construct branch roads from the main route to other towns or places in the several counties through which the road might pass," it is held to be limited to the construction of branch roads which leave the main route and terminate in the same county. It cannot extend such branches into another county.<sup>2</sup> But a railroad company having power to build a branch road may, under that power, construct a branch commencing near one of the termini and running in the same general direction as the main line, so as practically to form an extension thereof.<sup>3</sup> Where the charter confers a right to build branch roads the presumption follows that the company has the same right to condemn lands whereon to construct such roads as in the case of the main line.<sup>4</sup> And a limitation in the original charter as to the time within which the road must be finished, *does not apply to branch roads*, at least where the right of way to build branch roads has been acquired prior to the expiration of the period mentioned in the charter.<sup>5</sup> And where no limit is fixed in the charter to the time within which branch roads may be constructed, the courts cannot fix any limit, and where, by an act of the legislature, the time for completing the main road has been extended, the provision applies also to the case of lateral railroads.<sup>6</sup> But a feeble railroad, of doubtful ability to construct any road between the terminal points of its charter, will be restrained, at the suit of a municipality which has subscribed to it, from wasting its means in the construction of branch roads; and where the subscriptions were conditioned upon

<sup>1</sup> *Balt. & Hale G. T. Co. v. Union R. R. Co.*, 35 Md. 224. Under the Union Depot Act of the State of Missouri, encouraging all railroads running to St. Louis to centre at the Union depot, a company whose road runs near that city has a right to construct a branch road to the depot, where it is by its charter authorized to construct lateral roads. *Missouri v. St. L., K. C., & N. Ry. Co.*, 3 Mo. App. 130.

<sup>2</sup> *Works v. Junction R. R.*, 5 McLean (U. S.), 425.

<sup>3</sup> *Atlantic & Pacific R. R. Co. v. St.*

*Louis*, 66 Mo. 228. And a railroad company has power to condemn lands for new side tracks leading from its main road to the depot buildings whenever such tracks become necessary to the proper management and operation of the road. *Toledo & Wabash R. R. Co. v. Daniels et al.*, 16 Ohio St. 390.

<sup>4</sup> *Newhall v. Galena & Chicago Union R. R. Co.*, 14 Ill. 273.

<sup>5</sup> *Atlantic & Pacific R. R. Co. v. St. Louis*, 66 Mo. 228.

<sup>6</sup> *Newhall v. Galena & Chicago Union R. R. Co.*, 14 Ill. 273.

the road running through the town, and the construction of the branch is substantially an evasion of that condition, and a diversion of the road from the municipality, the company will be restrained on that ground from building it.<sup>1</sup> There seems now to be no question but that the legislature may constitutionally authorize a railroad company to construct lateral railroads to private manufacturing and mining establishments along its route, and to appropriate land therefor by virtue of the power of eminent domain. Such a taking is held to be for the public use because it tends to develop the industrial powers of the State and increase the facilities for bringing out and developing its resources, and increases its general wealth and prosperity.<sup>2</sup> But the right to build such branches cannot exist, except when they lead from the main line of a railway already constructed.<sup>3</sup>

**SEC. 190. Power to Contract to carry beyond its Line: for future Freights.** — A railroad corporation has authority to contract for the transportation of either passengers or goods beyond its own line, and when it does so contract, it becomes liable for injuries occurring to either, although they result from the negligence of other carriers.<sup>4</sup> In Connecticut a different doctrine is held,<sup>5</sup> but the rule is settled as stated in the text by the weight of authority, both in this country and in England;<sup>6</sup> and being a contract relating to the business for the prosecution of which it was created, and there being no express

<sup>1</sup> *Platteville v. Galena, &c. R. R. Co.*, 43 Wis. 493.

<sup>2</sup> *Getz's Appeal*, 65 Penn. St. 1.

<sup>3</sup> *Keeling v. Griffin*, 56 Penn. St. 305.

<sup>4</sup> *Noyes v. Rutland & Burlington R. R. Co.*, 27 Vt. 110; *Morse v. Brainerd*, 41 id. 550; *Grover & Baker Sewing-Machine Co. v. Missouri, &c. R. R. Co.*, 72 Mo. 672; *Ogdensburgh, &c. R. R. Co. v. Pratt*, 22 Wall. (U. S.) 123; *Ohio, &c. R. R. Co. v. McCarthy*, 96 U. S. 258. This question was raised, and after the most searching consideration, was decided in accordance with the doctrine stated in the text in *Bissell v. Michigan, &c. R. R. Co.*, 22 N. Y. 258; *Illinois Central R. R. Co. v. Copeland*, 24 Ill. 332; *Hill Mfg. Co. v. Boston & Lowell R. R. Co.*, 104 Mass. 122; *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; *Stewart v. Erie, &c. Transportation Co.*, 17 Minn. 372; *Milnor v. N. Y. & N. H. R. R. Co.*, 53 N. Y. 363; *Root v. Great Western R. R. Co.*, 45 id. 524; *Nashua Lock Co. v. Worces-*

*ter, &c. R. R. Co.*, 48 N. H. 339; *Cincinnati, &c. R. R. Co. v. Pontius*, 19 Ohio St. 221; *Caudee v. Penn. R. R. Co.*, 21 Wis. 582; *Perkins v. Portland, &c. R. R. Co.*, 47 Me. 573; *Wheeler v. San Francisco, &c. R. R. Co.*, 31 Cal. 46; *Baltimore, &c. Steamboat Co. v. Brown*, 54 Penn. St. 77.

<sup>5</sup> *Hood v. N. Y. & N. H. R. R. Co.*, 22 Conn. 1; *Converse v. Norwich Transportation Co.*, 33 id. 166.

<sup>6</sup> *Wilby v. West Cornwall Railway Co.*, 2 H. & N. 703. A railway company may contract for the conveyance of passengers from one of its stations to an adjoining village, and, while strictly it may not have the power to run a line of stages in connection with its road, yet having undertaken to do so, it is liable upon contracts made in relation thereto, and as a carrier while so engaged therein. *Buffet v. Troy & Boston R. R. Co.*, 36 Barb. (N. Y.) 420; affirmed 40 N. Y. 168.

prohibition in the statute, it is difficult to see upon what ground such a contract can be said to be *ultra vires*. It certainly is promotive of public convenience, and therefore cannot be said to be contrary to public policy. If such contracts are in excess of its powers, yet as between it and strangers, who are unaware of the fact, it is presumed to have authority, and not only is the burden upon it to establish its incapacity, but if the want of power is not apparent, it is binding upon it as to a person who has *bond fide* entered into and acted upon it.<sup>1</sup>

So, too, it is competent for a railroad corporation to enter into a contract for the transportation of freight at certain rates, for a fixed period. Thus, in an Ohio case,<sup>2</sup> the plaintiff road entered into a contract with the defendant to transport its freight between certain points at certain fixed rates for the period of ten years, and it was held that the contract was not *ultra vires* and was therefore binding upon the parties. JOHNSON, J., said: "The substance of this claim is, that a board of directors of a railway corporation have no authority to bind the corporation for a term of years, or for any future time, however short, which in any manner abridges or suspends the discretion of the same or any future board to fix rates such as 'the exigencies of the corporation and the public good might require,'—in short, that such a contract is *ultra vires*, notwithstanding the contract when made is based upon a sufficient and valuable consideration received by the corporation, and was in all respects fair and reasonable. In the discussion of this proposition, it is of the first importance that it should be carefully distinguished from other questions of somewhat kindred nature, which the learned counsel have blended with it in the argument.

"1. It is distinguishable from that class of contracts, sometimes made by common carriers, which are held to be void because they unjustly discriminate in favor of one shipper over another. The invalidity of such contracts arises from the fact, that it is against public policy to allow any common carrier, whether an individual or a corporation, to give an illegal preference to one shipper over another, for the same kind and amount of service. When such is the nature of the contract for transportation, its validity or invalidity does not depend upon the individual or corporate character

<sup>1</sup> Texas, &c. R. R. Co. v. Robard, 60 Tex. 545; 48 Am. Rep. 268; Cleveland, &c. R. R. Co. v. Himrod Furnace Co., 37 Ohio St. 321; 41 Am. Rep. 509.

<sup>2</sup> Cleveland, &c. R. R. Co. v. Himrod Furnace Co., *ante*.

of the carrier, but upon the provisions of the contract itself, unless the terms of the charter of the corporation limit its power to contract in this respect. These contracts are not enforceable because they are against public policy, and not because they are *ultra vires*. An act of a corporation is *ultra vires* when it is beyond the chartered powers of the corporation, and is therefore said to be void. It may also be void because it is against public policy as declared by statute, or the fundamental law, or for any reason that would make a like contract of an individual void. In the case before us, the court charged the jury as to what constituted an invalid contract on account of discrimination. That charge was not prejudicial to the plaintiff in error. The jury found as a fact that this contract was not obnoxious to this objection. A careful review of the evidence satisfies us that the jury were warranted in so finding. This eliminates from the problem the question of the invalidity of this contract on the ground of discrimination.

"2. That such a contract is not void for want of a sufficient consideration to support the promise of the railroad company, nor for want of mutuality of obligation between the parties, was settled in this case, when it was here before.<sup>1</sup> We see no reason to disturb that decision.

"3. This is not a question of the abuse, by the board of directors, of the judgment and discretion vested in them by law to contract for transportation. Neither the stockholders nor the public authorities are here complaining. It is not even insisted that the rates fixed by the contract are not reasonable and advantageous to the railroad company, nor that the board of directors did not act in perfect good faith. In view of the evidence and the verdict, we have the right to assume that the contract was to the mutual advantage of both parties, that it was made in good faith, and that its performance for the whole term would not have been injurious to the interest of the stockholders, or in any way suspend or abridge the powers conferred to discharge the duties the corporation owed to the public as a common carrier, to carry for all on equal terms.

"4. Neither does the length of time the contract has to run affect the question of power. A contract for a less time than ten years, or indeed for any time, is invalid if there is no corporate power to make time contracts for transportation. If the power exists to make a time contract for transportation, the discretion thus vested may

<sup>1</sup> Himrod Furnace Co. v. C. & M. R. R. Co., 22 Ohio St. 451.

be abused to the prejudice of the corporation and its stockholders. For such abuse of vested powers, the law furnishes a remedy in proper cases, as in other cases of a breach of trust by boards of directors of corporations. So it might by such a contract grant a monopoly to one shipper, and thus render it incapable of carrying for others. It is not claimed that the existence of this contract impairs the capacity of the company to carry for others as its public duty requires. We are thus brought to the question, whether the board of directors had the power or capacity to make a contract to transport property for a fixed time. This depends upon its chartered powers.

"Every undertaking to carry persons or property rests upon contract, express or implied. It may be the result of an express contract, agreed upon by the parties, or it may arise by implication of law. In either case it is a contract which gives the company the right to demand and receive compensation. The power that exists to make a contract for a single shipment will authorize a contract for a series of shipments or for a period of time. Whether the rates be fixed by a schedule and posted up, or by separate contract in each case, is not material. In either way, it is a lawful exercise of the power to contract with the shipper for a compensation.

"We fully agree that this corporation is the creature of the law, and that being such, 'it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence;' <sup>1</sup> and that grants of power to individuals to construct, maintain, and operate a railroad, as a body corporate, which are primarily designed for the profit of its stockholders, should receive a strict construction. 'The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation.' <sup>2</sup> This does not exclude the right to use any appropriate means to carry into effect the powers expressly granted, or necessarily implied. There is a clear line of distinction between cases involving the mode of exercising granted powers, and those where the power to do the act is wanting. If the power to do an act is clearly conferred, either by express grant or by necessary implication, the corporation may adopt any appropriate means not expressly forbidden. The mode or manner in which the act shall be done is, in the absence of limitations

<sup>1</sup> *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 636.

<sup>2</sup> *Beatty v. Knowler*, 4 Pet. (U. S.) 162.



imposed by the charter, left to the sound discretion of the corporate authority.

"In this case the power to make contracts for transportation cannot be questioned. Whether such contracts shall be made by a published tariff of rates, or as expressed in the bill of lading which accompanies each shipment, or by a general contract with each shipper for a longer or shorter term, rests, we think, in the sound discretion of the board of directors. If either method is resorted to, it is but the exercise of a power expressly granted, which is necessary and essential to carry out one of the leading objects of the corporation, namely, to earn money for the proprietors. If this were not so, railroad corporations would possess immunities that no individual has."

Contracts of this character are often of great importance in the creation and development of business upon the line of the railway, and it would be a singular and anomalous condition, if a railroad company should be denied the right to bind itself by such contracts. There certainly is no implied prohibition making them *ultra vires*, nor can they be said to be opposed to the policy of the law. Upon the principle that the company could not bind itself by a contract for ten years, it could not bind itself for a single day, and freighters would be subject to the caprices of such carriers, and manufacturers and other persons engaged in business upon its line could make no contracts for future delivery, because they could place no reliance upon the rates to be charged for transportation. Contracts of this character are not only frequent, but they are often the main inducement to the opening and establishment of important branches of business upon the road, and to hold that they are contrary to the policy of the law would work a serious public injury, and that, too, without any tenable ground for the doctrine.

**SEC. 191. When Corporation may set up ultra vires in Defence.**

—Generally, if an act of a corporation is shown to have been one which it had no authority under any circumstances to do, the plea of *ultra vires* is available even to the corporation itself, no matter under what circumstances the alleged performance took place; but when the objection is only that the act could not be performed without some precedent consent, or for some limited purpose, special facts may exist which meet and overthrow the defence. Thus, a person dealing with the corporation in good faith may have been justified in assuming that the required conditions for performance of

the act did exist, and if he has parted with value on that assumption the corporation may be bound, although it ought not to have acted.<sup>1</sup> But if a corporation had power to borrow money for some purposes, and has borrowed money, it cannot impeach the security or evidence of debt given therefor, by showing that the money was applied to another and prohibited purpose. The doctrine of *ultra vires* cannot be carried to the extent of requiring lenders to corporations to see to it that their money is lawfully employed by the corporate officers.<sup>2</sup> Nor can it be invoked to impeach engagements of

<sup>1</sup> *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *State Board of Agriculture v. Citizens' Street Ry. Co.*, 47 Ind. 407; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57.

<sup>2</sup> *Bradley v. Ballard*, 55 Ill. 413; *Thompson v. Lambert*, 44 Iowa, 239. It has been held that a contract by a railway company with a city, by which the company binds itself to erect a bridge and other accessory works across a river, at a point where, by its charter, it is not authorized to pass, and to do this by a definite time, and in default to pay a certain sum, as liquidated damages, such works being, without legislative authority, a nuisance, is an illegal contract, and equally so notwithstanding a stipulation that the company shall in the mean time exert itself to obtain an act authorizing the erections. *The Mayor of Norwich v. The Norfolk Ry. Co.*, 4 El. & Bl. 397. And where the chairman of a railway company promised the managing committee of a proposed railway company, that in consideration of their not abandoning their project, but pursuing it in Parliament, his company would, in case of their bill being rejected, insure the company of which they were the managing committee against all loss, and would pay all expenses incurred by them in endeavoring to obtain the act; and the company was authorized, by their acts, to apply their funds in certain ways, not including this,—it was held that the agreement was void, as it was an agreement made by contracting parties who must be presumed to know the powers of the defendant's company, and that the company could not do an act which was illegal, or contrary to public policy or the provisions of the statutes. *McGregor v.*

*the Official Manager of the Deal & Dover Ry. Co.*, 18 Q. B. 618. See also *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775, where the same question, in effect, is determined. A contract by which one railway agrees to give up to another railway a part of its profits, in consideration of securing a portion of the profits of the other company, is illegal, and *ultra vires*. *Shrewsbury & Birmingham Ry. Co. v. London & Northwestern Ry. Co.*, 6 H. L. 113. But one company may lawfully accept the lease of an unfinished railway under a specified rent yearly after the same is finished, and may stipulate for the payment in advance of the rent for the whole term for the purpose of constructing the road; and this will be no infringement of the statute allowing the connection of the two roads upon condition the first company shall not expend any portion of its reserved funds for the construction of the other road. This looks very much like one company building the road of the other out of its own funds, surplus or borrowed, for the use of such road a certain number of years. If so, it is converting surplus into capital without legal warrant. The case is so near the dividing line between what is and what is not justifiable as not to be of much authority, for general adoption by those who desire to protect an existing company against expending its funds in extending its line. It is one of those cases which hesitates at declaring the *bond fide* acts of corporations *ultra vires*, where no great harm to any one is expected to ensue, and the public interest has been materially subserved. *Durfee v. Old Colony, &c. R. R. Co.*, 5 Allen (Mass.), 230. The rule advanced in an English case, *Scottish Northeastern Ry. Co. v.*

a corporation to repay money loaned, except while the transaction remains executory on the part of the lender;<sup>1</sup> for when a contract to

Stewart, 5 Jur. N. S. 607, is that "a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except where the statutes by which it is located or regulated expressly or by necessary implication prohibits such contracts between the parties. *Prima facie*, all its contracts are valid, and it lies on those who impeach it to make out that it is avoided." This is the doctrine of *ultra vires*, and it is no doubt sound law, though the application of it to the facts of each particular case has not always been satisfactory. It would not be *ultra vires* for a company wishing to alter one of its branches, and about to apply to Parliament for authority to do so, to enter into a contract for land which would be necessary for the purpose if it should obtain the act. The question how far a railway company, without special grant of power for that purpose, may accept bills of exchange, is very carefully examined and thoroughly discussed, both by the court and counsel, in an English case. In *Bateman v. Mid-Wales Ry. Co.*, L. R. 1 C. P. 499; *Chambers v. Manchester, &c. Ry. Co.*, 5 B. & S. 588, the court say: "The law as laid down by PARKE, B., in *South Yorkshire Ry., &c. Co. v. Great Northern Ry. Co.*, 5 De G. M. & G. 576, does not appear to be questioned, and seems to be applicable to the present case. 'Corporations, which are creations of the law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by contracts in which all concurred.' This is undoubtedly true of corporations generally; but as Mr. Lush has observed, railway corporations are the creatures of an act of Parliament; and the question is, how far provision has been made for conferring upon them borrowing powers, which are said to have been exercised in the present case. But proceeds PARKE, B., 'where a corporation is created by act of Parliament for particular

purposes, with special powers, then indeed another question arises; their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactments, that the deed was *ultra vires*, — that is, that the legislature meant that such a deed should not be made.' This, as it appears to me, touches the very question before us, and, moreover, seems to convey the notion that directors of a railway company are of the nature of special rather than general agents of the company they represent. They have the custody of the seal of the company, but they have not the power to affix it to instruments which the legislature has declared to be *ultra vires*; and should this be done, the company are not bound. . . . These bonds, therefore, seem in effect to amount to an account stated, and a promise to pay, under seal; and, so long as they are used for the purpose for which they were originally intended, it may be that there is nothing objectionable in them. But here the bonds are issued by the directors for the purpose of raising money to discharge liabilities into which the plaintiff has entered on behalf of the company, of which he was chairman; and this is, to say the least of it, an indirect mode of borrowing, and beyond the powers conferred upon the company under their act. The point was also put to us upon the argument whether the prohibition to borrow was to be held to extend to the raising of small sums for the immediate necessities of a newly started company; and to this, we think, it was well answered, that if once a company be permitted to overdraw one hundred pounds, there would be no impediment to their doing so to any extent to which their credit would reach. I am therefore of opinion that these bonds are void, and that the plaintiff is not entitled to recover upon them." It is held that unless the corporation is a trading company, there is no presumptive power to accept bills of exchange. In the

<sup>1</sup> *Thompson v. Lambert*, 44 Iowa, 239.

which it is a party has been fully executed on the other part, and nothing remains to be done but the payment of the consideration by

case of railway corporations, created for a special purpose, there is no presumptive power either to borrow money, or to issue or accept bills of exchange for the purpose of negotiation in the market. The rule is thus stated by one of the judges in the case last cited, speaking of trading corporations. "Such a corporation may, in some cases, bind itself by promissory notes and bills of exchange. . . . But a corporation will not have these extraordinary powers, unless the nature of the business in which it is engaged raises a necessary implication of their existence." But where a railway corporation receives a bill or note in the course of business, it may indorse it and become liable as an indorser thereon, and if it has authority to contract debts, borrow money, etc., there is no question as to its authority to draw or accept bills of exchange. *Kean v. Davis*, 21 N. J. L. 683; *Wetumpka, &c. R. R. Co. v. Bingham*, 5 Ala. 657; *Waddill v. Alabama, &c. R. R. Co.* 35 id. 323; *Marion, &c. R. R. Co. v. Hodge*, 9 Ind. 163; *Chicago, &c. R. R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Wood v. Whelen*, 93 Ill. 153; *Branch v. Atlantic, &c. R. R. Co.*, 3 Woods (U. S. C. C.), 481; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159. Contracts *ultra vires*, entered into by the directors, and which are not binding upon the company, cannot be specifically enforced against the directors, nor can the directors be decreed by the court to make good their representations. *Ellis v. Coleman*, 25 Barb. (N. Y.) 662. A corporation having no power to lend, made a loan to a company having no power to borrow. The borrowers were aware of those facts. They bought a canal with the money; but that was set aside, and the purchase-money ordered to be refunded. The loaning company sought a refunding of the money loaned by them, with the interest, out of the refunded purchase-money. It was held that they were entitled to a decree accordingly. *Ernest v. Croysdell*, 2 De G. F. & J. 175. It is held in England that the lender of money to a company *having no power to borrow*, cannot compel the company to refund the money, unless

it has been *bond fide* applied to the purposes of the company. *Troup in re*, 29 Beav. 353; *Hoare ex parte*, 30 id. 225. Where part of a contract only is *ultra vires* of the company, a court of equity will restrain that portion only. *Maunsell v. Midland Great Western Ry. Co.*, 1 H. & M. 130. It was here held, that an agreement to contribute to the Parliamentary deposit required on bills promoted by another company is *ultra vires*. So is an agreement to take shares in the future extension of another company. So also is an agreement to make traffic regulations applicable to future extensions. But no such agreement is *ultra vires* if its validity is expressly made dependent upon the sanction of Parliament. But where part of an entire arrangement between two companies, the parts of which are dependent upon each other, is illegal, or *ultra vires*, a court of equity will restrain the execution of every portion of the arrangement. *Hattersley v. Shelburne*, 7 L. T. N. s. 650. Where there is a defect of capacity in the company to do the act, the power cannot be created by the express agreement of the shareholders; nor can it be presumed from any extent of acquiescence. But where only certain formalities are required to the valid execution of the act, as the consent of a general meeting, that will be presumed from acquiescence. *British Provident Life Ins. Co., ex parte Grady*, 9 Jur. N. s. 631. But where dissentient members were allowed to retire by the resolution of a general meeting, it was held that the other members could not be allowed to question its regularity and validity, after an acquiescence of twenty years, although *ultra vires*. *Brotherhood in re*, 31 Beav. 365. A restriction upon the liability of the shareholders for bills drawn by the company will not affect the responsibility of the company. *State Fire Ins. Co.*, 8 L. T. N. s. 146. In one case the directors of an insurance company offered to pay losses caused by the explosion of gunpowder, although expressly excepted from the risks assumed by the policy, at the same time not admitting any legal liability to do so. On a bill by a shareholder to restrain the

the corporation, it will not be allowed to set up that the contract was *ultra vires*.<sup>1</sup>

And as we have already seen, the same rule prevails as to the persons with whom the contract was made. Thus, if a purchaser from or promisor to a corporation has received from the corporate body the property or consideration for which he has engaged to make payment, he should not be allowed to escape the obligation by disputing the power of the corporation to pass the property or consideration which he has accepted from it. Indeed it seems now to be generally conceded that the objection that a corporate act is *ultra vires* ought never to be entertained when injustice will be done by allowing it,<sup>2</sup> unless the act is one which is expressly prohibited by its charter or the general law,<sup>3</sup> so that it is *malum prohibitum* and the other party can be said to be *in pari delicto*.

SEC. 192. **Who may question Act, as *ultra vires*.**—The defence of *ultra vires* is only open to the State or a party interested in the corporation. Thus a railway company appropriated under the statute, for its purposes, land of plaintiff and paid for it. It afterward transferred the land to another company. It was held that the plaintiff whose interests were not affected could not question the validity of the transfer. In respect to conveyances to or by a corporation, no one whose interests are not affected, except the State, can call in question the capacity of the corporation either to convey or to receive and hold property. As to persons whose interests are not so affected, if the State acquiesces in the exercise by the corporation of power to purchase and convey beyond what the State has conferred on it, they have no right to complain.<sup>4</sup> The act of the

directors from doing so, it appearing that it was usual and advantageous for companies to do so, although not strictly responsible for the loss, it was held that this was a mode of carrying on the business with which the court could not interfere. *Taunton v. Royal Ins. Co.*, 2 H. & M. 135. It is said in a later case that in matters strictly relating to the internal management of the company, even though not strictly within the terms of the constitution of the company, the court will not interfere. But if the matters complained of are plainly beyond the powers of the company, and are inconsistent with the objects for which the company was constituted, the court will interfere, at the in-

stance of the minority, to prevent the act complained of from being carried out. *Gregory v. Patchett*, 33 Beav. 595.

<sup>1</sup> *Oil Creek, &c. R. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160.

<sup>2</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

<sup>3</sup> *State Agric. Board v. Citizens' St. R. R. Co.*, 47 Ind. 407.

<sup>4</sup> *Matthews v. Marchison*, 15 Fed. Rep. 691; *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. (N. Y.) 158; *Filder v. London, &c. Ry. Co.*, 1 H. & M. 489; *Hare v. London &c. Ry. Co.*, 2 John. & H. 86; *Ffooks v. So. Western Ry. Co.*, 1 Sm. & G. 142; *Forrest v. Manchester, &c. Ry. Co.*, 4 De G. F. & J. 126. And even a

corporation is like that of an alien in jurisdictions where the rule of the common law, as to the capacity of the alien to hold and convey real estate, still prevails. As to every one but the sovereign, the conveyance to or by an alien is valid.<sup>1</sup>

The legal interest which qualifies a complainant other than the State itself to sue in such a case is a *pecuniary interest* in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellant has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he alleges that the railroad company is acting beyond the warrant of law, the answer is that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed.<sup>2</sup>

bondholder of one railroad company is not the proper person to object to the right of another company to own stock in the road whose bonds he holds. *Matthews v. Marchison*, *ante*; *Natoma Water Co. v. Clarkin*, 14 Cal. 544; *Union Water Co. v. Murphy's Flat Co.*, 22 id. 621; *Chicago, B., & Q. R. R. Co. v. Lewis*, 53 Iowa, 101; *Chambers v. City of St. Louis*, 29 Mo. 543; *Martindale v. Kansas City & St. Jo. R. R. Co.*, 60 id. 508; *Goundie v. Northampton Water Works Co.*, 7 Penn. St. 233; *Grant v. Henry Clay Coal Co.*, 80 id. 208; *Smith v. Sheeley*, 12 Wall. (U.S.) 358; *Nat. Bank v. Mathews*, 98 U.S. 621.

<sup>1</sup> *Crolley v. Minneapolis & St. Louis R. R. Co.*, 30 Minn. 541. An officer of a corporation, sued by the corporation for unlawfully converting stock purchased by him for the corporation, cannot plead *ultra vires* in defence. *St. Louis Stoneware Co. v. Partridge*, 8 Mo. App. 217. In a suit on a note, the makers answered that the plaintiff corporation exceeded its powers in loaning the money for which the note

was given to one not a member thereof. It was held no defence. *Poock v. Lafayette Building Assoc.*, 71 Ind. 357.

<sup>2</sup> *MATTHEWS, J.*, in *New Orleans, &c. R. R. Co. v. Ellerman*, 105 U.S. 166; *City of Georgetown v. Alexandria Canal Co.*, 12 Peters, 91. It is applied in *Mayor of Liverpool v. Chorley Water Works Co.*, 2 De G. M. & G. 852; *Stockport District Water Works v. Mayor of Manchester*, 9 Jur. (N. S.) 266; *Pudsley Coal Gas Co. v. Corp. of Bradford*, L. R. 15 Eq. 167. In an action by a corporation of Massachusetts, owning mining leases in Pennsylvania, for the price of coal sold to a party in the latter State, through an agent here, known to the buyer to be such agent, it was held that the defendant could not raise the question of the plaintiff's right to hold such leases. The inquiry into such right could be made only by the Commonwealth. *Grant v. Henry Clay Coal Co.*, 80 Penn. St. 208. In *Beecher v. Marquette, &c. Co.*, 45 Mich. 103, a notice of meeting of stockholders of a corporation stated the purpose of the

And a court of equity will not restrain a railroad company from doing acts in excess of their power, unless some public injury is shown either to have ensued, or as likely to ensue.<sup>1</sup>

meeting among other things to be to authorize the issue of bonds to the extent of \$100,000 to be secured by mortgage on the corporate property. The meeting actually authorized the issue of \$150,000 bonds, which were issued. It was held that a purchaser at an execution sale of the corporation's equity of redemption could not object to the validity of the bonds and mortgage, even under a statute providing that no mortgage of the real estate of any corporation should be valid unless authorized at a meeting notice of the object of which had been given to the stockholders. The purpose of the statute was to protect stockholders only. A statute making usurious mortgages utterly void was in Massachusetts construed not to authorize strangers to the consideration to question such a mortgage. *Green v. Keep*, 13 Mass. 515. In *Rex v. Hipswell*, 8 B. & C. 466, it was intimated that the word *void* in a statute might be construed *voidable* where the provision is introduced for the benefit of parties only, but not where it is introduced for public purposes and to protect those who are incapable of protecting themselves; and though this distinction has been questioned (*Rex v. St. Gregory*, 2 Ad. & El. 99), much good reason lies at the foundation of it. If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while if the manifest intent is to give protection to determinate individuals who are *sui juris*, the purpose is sufficiently accomplished if they are given the liberty of avoiding it. A statute would strike blindly if the letter alone were to be regarded, not the spirit. A statute declared that certain indentures not made as by the statute provided should "be clearly void in law to all intents and purposes;" and it was nevertheless held that if acted upon, the apprentice gained a settlement thereby. *St. Nicholas v. St. Peter*, Stra. 1066. And in Ohio a purchase at a judicial sale by one who acted as appraiser of the property, though the statute declared

it should be "considered fraudulent and void," was held to be voidable only on a proceeding by a party in interest directly for the purpose of avoiding it. *Terrell v. Auchauer*, 14 Ohio St. 80. This subject is considered at length and many authorities examined in *State v. Richmond*, 26 N. H. 132.

<sup>1</sup> *Atty.-General v. Railroad Co.*, 35 Wis. 425; *United States v. Union Pacific R. R. Co.*, 98 U. S. 569. In *Atty.-General v. Tudor Ice Co.*, 104 Mass. 237, 6 Am. Rep. 227, this question was elaborately considered by GRAY, J. In that case an information was filed by the Attorney-General on the relation of one Richard Price, to restrain the Tudor Ice Co. from conducting the business of cutting and storing ice. It appeared that the company was formed and organized in 1861 under the General Statutes, for the purpose of cutting, storing and selling ice. Its capital stock was fixed at \$360,000. It had carried on this business ever since, but had also carried on various other branches of business; had been in the habit of chartering vessels for the East Indies, loading them with ice, so far as was proper, and completing the cargo by purchasing and exporting kerosene oil, tobacco, rosin, and lumber; and had also imported merchandise of various kinds, including paddy, jute, linseed, and tea. It had also erected buildings, and placed machinery in them which cost about \$400,000. Some of the machinery was for the manufacture of tobacco, but the manufacture was discontinued about two years before. Some of it was for cleaning rice, some for the manufacture of jute into gunny cloth, and some for the manufacture of linseed into oil. These branches of business it still carried on when the information was filed, and the capital invested in them was three or four times larger than its capital stock. The business was connected with the exportation of ice, and had increased the profits of the company, but did not appear to be necessary to its legitimate business. It had imported two cargoes of tea, worth \$300,000, which had

It would seem, except where some public injury is shown to result from the usurpation of authority, that it is more just and reason-

no connection with the ice trade. It did not appear that any of the creditors of the company were in danger of losing by it, and there were no objections to its proceedings, except that they were not authorized by its act of incorporation, and were alleged to be against public policy for that reason. GRAY, J., said: "This court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common-law side of this court, or of the other courts of the commonwealth. The Tudor Ice Company is a private trading corporation. It is not in any sense a trustee for public purposes. This is not a suit by a stockholder or a creditor. The acts complained of are not shown to have injured or endangered any rights of the public, or of any individual or other corporation, and cannot, upon any legal construction, be held to constitute a nuisance. It is expressly stated, in the report of the Chief Justice, that, 'it does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation, and are alleged to be against public policy for that reason.' No case is, therefore, made upon which, according to the principles of equity jurisprudence and the practice of this court, an injunction should be issued upon an information in chancery. In *Attorney-General v. Utica Insurance Co.*, 2 Johns. Ch. (N. Y.) 371, Chancellor KENT, in a very able and elaborate judgment, after a thorough discussion of the question on principle, and an extensive examination of the earlier authorities, held that such an information could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of New York, but that the proper remedy was at law, by information in the nature of a *quo warranto*; and no appeal appears to have been taken from his decree. An information in the nature of a *quo warranto* was thereupon

filed, and sustained by the Supreme Court of New York, and judgment rendered thereon that the corporation be ousted from the franchise which it had usurped. *People v. Utica Insurance Co.*, 15 Johns. (N. Y.) 358. Similar proceedings may be had at law in this commonwealth in a proper case. *Goddard v. Smithett*, 3 Gray (Mass.), 116, 122, 123; *Attorney-General v. Salem*, 103 Mass. 138; *Boston & Providence R. R. Co. v. Midland R. R. Co.*, 1 Gray (Mass.), 340; Gen. Sts., ch. 145, §§ 16-24. One early English case of high authority, not cited by Chancellor KENT nor at the argument of the present case, is so much in point as to be worth quoting in full. Upon a bill in equity, filed by the Attorney-General, at the relation of several freemen of the Weavers' Company against the officers of that company, setting forth 'that the defendants had been guilty of many breaches and violations of their charters, and had oppressed the freemen, etc., and mentioned some particulars; and for a discovery of the rest, and that they might be decreed for the future to observe the charters, and to have an account of the revenue of the corporation which the defendants had misspent, etc., was the end of the bill. To which the defendants demurred, because, as to part of the bill, it was to subject them to prosecutions at law, and to a *quo warranto*; and, as to the other parts, the plaintiffs had remedy by *mandamus*, information, or otherwise, and not here. And of the same opinion,' the report proceeds, was Lord COWPER, 'who said it would usurp too much on the king's bench; and that he never heard of any precedent for such a case as this, and so allowed the demurrer.' *Attorney-General v. Reynolds*, 1 Eq. Cas. Ab. (3d ed.) 131. The modern English cases cited in support of this information were of suits against public bodies or officers, exceeding the powers conferred upon them by law, or against corporations vested with the power of eminent domain and doing acts which were deemed inconsistent with rights of the public. Some of them were cases of misapplication of funds raised by taxation, and held by municipal corpo-



able to leave the matter to the Legislature, through whose instrumentality the corporation was created, and whose power to deal with

rations or officers upon specific public trusts. Such were *Attorney-General v. Norwich*, 16 Sim. 225; *Attorney-General v. Guardians of Poor of Southampton*, 17 id. 6; and *Attorney-General v. Andrews*, 2 Mac. & G. 225. The hypothetical case in which Lord WESTBURY, in *Stockport District Water Works v. Manchester*, 9 Jur. N. s. 266, said that he should 'probably not hesitate' to act upon the information of the Attorney-General, was of a suit to restrain the making of a contract between an aqueduct corporation and a city, to carry water beyond the limits which the city was authorized by law to supply. The passages cited from *Liverpool v. Chorley Water Works Co.*, 2 DeG., M. & G. 852, 860, and *Ware v. Regent's Canal Co.*, 3 De G. & J. 212, 228, were but *dicta*, that an unauthorized diversion of water, or flowing of land, by an aqueduct or canal corporation, without proof of actual or imminent injury to property, gave no right of suit to an individual, and could only be checked on an application to the court by the Attorney-General. The case of *Attorney-General v. Great Northern Ry. Co.*, 4 De G. & S. 75, was a clear case of nuisance, the unlawful obstruction of a public highway by a railroad. That of *Attorney-General v. Oxford, Worcester, & Wolverhampton Ry. Co.*, 2 Weekly Rep. 330, was the case of the opening of a railway line, in violation of an order which an authorized public board had made upon the ground that it would be unsafe to the public. The single case in which an information has been sustained in an English court of chancery against a corporation for carrying on a business beyond its corporate powers is *Attorney-General v. Great Northern Ry. Co.*, 1 Dr. & S. 154, in which Vice-Chancellor KINDERSLEY, in 1860, restrained a railway company from trading in coal in large quantities, upon the ground that there was danger that, if allowed to go on, it might get into its hands the coal trade of the whole district from or through which its railway ran, and thus acquire a monopoly injurious to the public. That case is evidently the foundation of the *dictum* of Vice-Chancel-

lor WOOD, two years later, in *Hare v. London & North-Western Ry. Co.*, 2 Johns. & H. 80, 111. In *Attorney-General v. Mid Kent Ry. Co.*, L. R. 3 Ch. 100, a mandatory injunction was granted upon the information of the Attorney-General, to compel a railway company to construct a bridge over a public road, and with as gradual a slope as was required by a special clause in its charter; and the objection, that the Attorney-General might have had an equal and complete remedy at law, was stated by each of the lords justices as if it required no answer and afforded no ground for refusing to entertain jurisdiction in equity. It is often said, in the English books, that the King or his Attorney-General, suing in behalf of the public, has the election to sue in either of his courts, and may therefore enforce a legal right in the court of chancery. 1 Dan. Ch. Bract. (3d Am. ed.) 6, 7; *Attorney-General v. Galway*, 1 Moll. 95, 103. However that may be, by our statutes the general equity jurisdiction of this court is limited to cases where there is no plain, adequate, and complete remedy at law, as well in suits by the Commonwealth as in those brought by private persons. Gen. Sts. ch. 113, § 2; *Commonwealth v. Smith*, 10 Allen (Mass.), 448; *Clouston v. Shearer*, 99 Mass. 209, 211, and other cases there cited. The thirty-eighth of the former rules in chancery of this court (14 Gray, Mass. 360), by which the court adopted, as the outlines of its practice, the practice of the high court of chancery in England, so far as the same was not repugnant to the constitution and laws of the commonwealth, nor to those or such other rules as the court might from time to time make; cannot enlarge the jurisdiction of this court as defined by statute and has been repealed by the new rules recently established. The only cases in which informations in equity in the name of the Attorney-General have been sustained by this court are of two classes. The one is of public nuisances, which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters.

the matter in an equitable and proper manner is more extensive than that possessed by the courts.

**SEC. 193. General summary: Rules.**—This branch of the law of corporations, so fruitful in conflicts of authority, and of theories, might be treated indefinitely. But we believe that what we have already said relative to the matter will convey a reasonably explicit idea of the rules applicable thereto, as gathered from the most approved authorities; and we will close with this general summary of rules which we regard as being well sustained by the courts of this country:—

If a contract which is *ultra vires* is executed by a corporation or by an agent on its behalf, and by virtue thereof it receives the consideration and fruits of the same, and appropriates it, and all the members receive the benefit of it and acquiesce therein, the plea of *ultra vires* cannot be maintained by such corporation as a defence to an action on the contract.<sup>1</sup>

District Attorney *v.* Lynn & Boston R. R. Co., 16 Gray (Mass.), 242; Attorney-General *v.* Cambridge, id. 247; Attorney-General *v.* Boston Wharf Co., 12 Gray (Mass.), 553; Rowe Granite *v.* Bridge Co., 21 Pick. (Mass.) 344, 347. The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in behalf of the public. County Attorney *v.* May, 5 Cush. 336; Jackson *v.* Phillips, 14 Allen (Mass.), 539, 579; Attorney-General *v.* Garrison, 101 Mass. 223; Gen. Sts. Ch. 14, § 20. If there are any other cases to which this form of remedy is appropriate, that of a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation and are therefore against public policy, is not one of them."

<sup>1</sup> Peoria, &c. R. R. Co. *v.* Thompson, 103 Ill. 187; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Tracy *v.* Talmage, 14 N. Y., 162; Herzo *v.* San Francisco, 33 Cal. 134; Morville *v.* American Tract Society, 123 Mass. 129; German National Bank *v.* Meadowcroft, 95 Ill. 124; Argenti *v.* San Francisco, 16 Cal. 355; Kent *v.* Quicksilver Mining Co., 78

N. Y. 159; Oil Creek, &c. R. R. Co. *v.* Penn. Transp. Co., 83 Penn. St. 160; Dimpfel *v.* Ohio, &c. R. R. Co., 9 Biss. (U. S. C. C.) 127; Rutland, &c. R. R. Co. *v.* Proctor, 29 Vt. 93; N. W. Union Packet Co. *v.* Shaw, 37 Wis. 655; Wapello *v.* B. & M. R. R. Co., 44 Iowa, 585; Faulke *v.* San Diego, &c. R. R. Co., 51 Cal. 365; Miners' Ditch Co. *v.* Zellerbach, 37 id. 543; Perkins *v.* Portland, &c. R. R. Co., 47 Me. 573; Hitchcock *v.* Galveston, 96 U. S. 351; Ossipee Mfg. Co. *v.* Canney, 54 N. H. 295. The case of National Bank *v.* Matthews, 98 U. S. 621, seems to go to the length of holding that even an act prohibited to a corporation is not necessarily void; and that though the plea of *ultra vires* amounts to that of illegality, it will not necessarily prevail, unless the intention of the statute making the act illegal is clear. The case concerns the power of a national bank to loan upon real estate security. See also County of Macon *v.* Shores, 97 U. S. 272, 279; Hotel Co. *v.* Wade, 97 U. S. 13; Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587; Zantzinger *v.* Gunton, 19 Wall. 32; *Re* Jaycox, 12 Blatchf. 209; Stewart *v.* National Bank, 2 Abb. U. S. 424; *Re* Comstock, 3 Saw. (U. S. C. C.) 218; Dimpfel *v.* R. R. Co., *ante*; San Antonio *v.* Mehaffy, 96 U. S. 312; Zabriskie *v.* C. C. &c. R. R. Co., 25

If a contract is entered into by a corporation or its agents which is *ultra vires*, so long as it remains wholly unexecuted, any stockholder, or, under certain circumstances, a creditor, may, by a proper proceeding, restrain the execution of the same.<sup>1</sup>

If a contract is *ultra vires* because it is in violation of positive law or against public policy, the execution of it may be restrained upon proper proceedings in equity to that end, and instituted by a stockholder or other interested party, without any reference to the motives which actuate the stockholder in bringing the suit.<sup>2</sup>

How. (U. S.) 381; *Mayor v. Ray*, 19 Wall. (U. S.) 468; *Gold Mining Co. v. National Bank*, 96 U. S. 640; *Bangor Boom Co. v. Whitney*, 29 Me. 123; *Noyes v. Rutland, &c. R. R. Co.*, 27 Vt. 110; *Kelly v. People's Transportation Co.*, 3 Oreg. 189; *Bradley v. Ballard*, 55 Ill. 413; *Thompson v. Lambert*, 44 Iowa, 239; *Union Mining Co. v. Rocky Mountain National Bank*, 2 Cal. 256, 96 U. S. 640; *Kneeland v. Gilman*, 24 Wis. 39; *Darst v. Gale*, 83 Ill. 136; *Willson v. Owen*, 30 Mich. 474; *Hayes v. Galion Gas Co.*, 29 Ohio St. 330; *Littlemort v. Davis*, 50 Miss. 403; *Haynes v. Covington*, 21 id. 408; *Natchez v. Mallery*, 54 id. 499; *Murphy v. Louisville*, 9 Bush (Ky.), 197; *Bank v. Hammond*, 1 Rich. (S. C.) L. 281; *Hazelhurst v. Savannah, &c. R. R. Co.*, 43 Ga. 13; *Southern Life Ins. Co. v. Lanier*, 5 Fla. 110; *Farnham v. Del. & Hud. Canal Co.*, 61 Penn. St. 265; *Allegheny City v. McClurkan*, 14 id. 81; *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557; *Converse v. Norwich, &c. Transportation Co.*, 33 id. 166; *Attleborough Natl. Bank v. Rogers*, 125 Mass. 339; *Whitney v. First Natl. Bank of Brattleboro'*, 50 Vt. 388; *Town of Bennington v. Park*, 50 id. 178; *Bunk v. Concord*, 50 id. 257.

<sup>1</sup> *Gas Co. v. San Francisco*, 9 Cal. 453; *McIndoe v. St. Louis*, 10 Mo. 576; *Chambers v. City of St. Louis*, 29 Mo. 543; *B. C. R. &c. R. R. Co. v. Stewart*, 39 Iowa, 267.

<sup>2</sup> *Ramsay v. Gould*, 57 Barb. (N. Y.) 398; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Ramsay v. Erie R. R. Co.*, 8 Abb. Pr. (N. Y.) N. s. 174; *Hodges v. N. E. Screw Co.*, 1 R. I. 312; *Platteville v. Galena, &c. R. R. Co.*, 43 Wis. 493; *Chetlain v. Republic Ins. Co.*, 86 Ill. 220;

*Mowrey v. Indianapolis, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 78; *Peabody v. Flint*, 6 Allen (Mass.), 52; *Chapman v. Mad River, &c. R. R. Co.*, 6 Ohio St. 119; *Cozart v. Georgia, &c. R. R. Co.*, 54 Ga. 379; *Winch v. Birkenhead, &c. Ry. Co.*, 5 De G. & S. 562; *Occum v. Sprague Mfg. Co.*, 34 Conn. 529; *Atty.-Genl. v. Great Northern Ry. Co.*, 1 D. & S. 184; *March v. Eastern R. R. Co.*, 40 N. H. 548. That such contracts not executed are void, see *Martin v. Mayor*, 1 Hill (N. Y.), 345; *Boon v. Utica*, 2 Barb. (N. Y.) 104; *Cornell v. Guilford*, 1 Den. (N. Y.) 510; *Boylard v. Mayor, &c.*, 1 Sandf. (N. Y.) 27; *Dill v. Wareham*, 7 Met. (Mass.) 438; *Parsons v. Inhabitants of Goshen*, 11 Pick. (Mass.) 396; *Vincent v. Nantucket*, 12 Cush. (Mass.) 103; *Stetson v. Kempton*, 13 Mass. 272; *Spaulding v. Lowell*, 23 Pick. (Mass.) 371; *Clark v. Polk Co.*, 19 Iowa, 248; *Estep v. Keokuk Co.*, 18 id. 199; *Mitchell v. Rockland*, 45 Me. 496; s. c., 41 id. 363; *Anthony v. Cleveland*, 12 Ohio, 375; *Commissioners v. Cox*, 6 Ind. 403; *Inhabitants v. Weir*, 9 id. 224; *Smead v. R. R. Co.*, 11 id. 104; *Brady v. Mayor, &c.*, 20 N. Y. 312; *Appleby v. Mayor, &c.*, 15 How. Pr. (N. Y.) 428; *Cuyler v. Rochester*, 12 Wend. (N. Y.) 165; *Hodges v. Buffalo*, 2 Den. (N. Y.) 110. But it has been held that where money has been advanced to a municipal corporation on a contract void for want of authority on the part of the corporation to make it, and the corporation afterward refuses to fulfil the contract, the party thus advancing the money may, without a demand of it, recover it back in an action for money had and received. *Dill v. Wareham*, 7 Met. (Mass.) 438. See also *McCracken v. San*

If a contract is *ultra vires*, it is held by some of the authorities that this may be set up as a defence to an action on the contract; but in such a case the other party to such contract, or his assigns, may, in all cases, recover the consideration of the contract, namely, the money advanced or the value of the property delivered thereon.<sup>1</sup>

In all cases where money or property has been received by a corporation by virtue of a contract, and the act has received the universal assent, either express or implied, of the corporators, such contract will be binding, notwithstanding it may be *ultra vires*; and if a defence by the corporation of *ultra vires* can be successfully interposed to a recovery on such contract, it cannot defeat the right of the other party to recover the amount of money advanced or the value of property actually delivered by him, and received and appropriated by such corporation.<sup>2</sup>

The better doctrine is that where a contract in excess or outside the corporate powers has been made by a corporation, and it has received the full consideration and appropriated the same, so that it cannot be restored and the other party placed in *statu quo*, and especially where no objection is interposed upon the part of those who might have made it, the corporation will be bound by the contract, the same as a natural person.<sup>3</sup>

And it may also be said that, although a contract *wholly outside the purposes of its creation* if entered into is void, yet if a corporation contracts with reference to matters within its powers, but in doing so exceeds them, the person with whom it deals cannot set up such excessive exercise of its corporate powers to avoid the contract.<sup>4</sup>

Francisco, 16 Cal. 571; Dill. on Mun. Corp., § 381; Marsh v. Fulton Co., 10 Wall. (U. S.) 676; Thomas v. Richmond, 12 id. 349; Bridgeport v. Housatonic, &c. R. R. Co., 15 Conn. 475; Leavenworth v. Rankin, 2 Kan. 358. But this doctrine seems to be somewhat qualified in *Allegheny City v. McClurkan*, 14 Penn. St. 81, where it was held that a municipal corporation may be liable for the unauthorized contracts of its officers, when these are publicly entered into with the knowledge of the citizens, and not objected to.

<sup>1</sup> *Maryland Hospital v. Foreman*, 29 Md. 524; *Dill v. Wareham*, 7 Met. (Mass.) 438.

<sup>2</sup> *Ante*, § 171.

<sup>3</sup> *Ante*, p. 506.

<sup>4</sup> *Littleworth v. Davis*, 50 Miss. 463; *Cannon v. McNab*, 48 Ala. 99. In *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, ALLEN, J., says: "When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created.

**SEC. 194. Right to hold Real Estate.**—The power of a railroad corporation to acquire real estate by condemnation, under the powers conferred upon it by its charter, is limited to such as is necessary for the location of its road, stations, and other *necessary* buildings;<sup>1</sup> but without authority to do so it has no power to purchase lands as an investment or for speculative purposes.<sup>2</sup> But at the common law it may purchase and hold lands in fee, and may convey a fee therein, although it is chartered only for a limited period;<sup>3</sup> and this is also the rule as to lands acquired by it in a lawful manner in other States than that of its creation.<sup>4</sup> The rule may be said to be that in the absence of any provision in the statute giving it authority to do so, a corporation can purchase and hold lands only for such purposes as are authorized in their charter.<sup>5</sup> The grant of corporate franchises, being restrictions of individual rights, will not be extended

Whether the contract, as originally made, was *ultra vires* is not a very important inquiry at this time. . . . The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong. . . . One who has received from a corporation the full consideration of his engagement to pay money, either in services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defence to prevail in an action by the corporation. It is now very well settled that a corporation cannot avail itself of the defence of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief, or an action in some other form will prevail. The same rule holds *e contrario*. *If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.*"

<sup>1</sup> Eastern Counties Ry. Co. v. Hawkes,

5 H. L. Cas. 331; Eldredge v. Smith, 34 Vt. 484; Taber v. Cincinnati, &c. R. R. Co., 15 Ind. 459; Norwich v. Norfolk Ry. Co., 4 El. & B. 397; State v. Newark, 25 N. J. L. 315; Waldo v. Chicago, &c. R. R. Co., 14 Wis. 575; Overmyer v. Williams, 15 Ohio, 26; Blunt v. Walker, 11 Wis. 334; Pacific R. R. Co. v. Seeley, 45 Mo. 212.

<sup>2</sup> Overmyer v. Williams, *ante*.

<sup>3</sup> Page v. Heinberg, 40 Vt. 81; Callo-way, &c. Co. v. Clark, 32 Mo. 305; Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. 121; Rives v. Dudley, 3 Jones (N. C.) Eq. 126; People v. Mauran, 5 Den. (N. Y.) 389.

<sup>4</sup> State v. Boston, &c. R. R. Co., 25 Vt. 433; Metropolitan Bank v. Godfrey, 23 Ill. 379; Lombard v. Aldrich, 8 N. H. 31; Libbey v. Hodgdon, 9 id. 394; Leazure v. Hillegas, 7 S. & R. (Penn.) 313. As where land is taken upon a mortgage or in payment of a debt. Blunt v. Walker, 11 Wis. 434.

<sup>5</sup> Whether property to which a corporation has the apparent legal title is necessary for the purposes of its incorporation, so that it has power to hold it, is a question to be raised by government alone, and not by a defendant in ejectment. Natoma, &c. Co. v. Clarkin, 14 Cal. 544; Leazure v. Hillegas, *ante*; Baird v. Bank, 11 S. & R. (Penn.); Gaundie v. Northampton Water Co., 7 Penn. St. 233.

beyond the letter and spirit of the charter; yet it is not to be so strictly construed as to defeat the object of the grant; besides the powers expressly granted, such as are strictly incidental and necessary to the object of the grant are implied. Thus, depots, car and engine houses, tanks, repairing shops, houses for bridges and switch-tenders, coal and wood yards, are necessary appendages to the operations of a railroad and transportation company, and their power to hold land for these purposes will be implied without an express grant in their charter; but lands for dwellings of employés, for car or locomotive factories, coal mines, and matters of that kind, are things of convenience, and not of necessity.<sup>1</sup>

So a railroad corporation, authorized by charter to hold real estate necessary for the purpose of locating, constructing and repairing their road, not exceeding one hundred feet in width, may purchase and hold land for the procurement of materials, or for the economical construction of the road.<sup>2</sup> And in an English case<sup>3</sup> it was intimated that a railway company might supply a chapel or theatre for the benefit of its employés. So it may buy land under some circumstances, and erect dwellings thereon for its officers and workmen.<sup>4</sup> So it has been held that it may buy land and sell the gravel thereon and then sell the land, and a court of equity will enforce the sale.<sup>5</sup> So it may buy woodland, or a coal mine to supply itself with fuel, and may as incidental thereto sell its surplus wood and coal;<sup>6</sup> but it cannot take lands under the right of eminent domain for such purpose.

A conveyance to a corporation authorized to receive conveyances of land for certain purposes will be presumed to have been received for some purpose within the powers of the corporation, unless an illegal purpose is made to appear.<sup>7</sup> In an action brought by a corporation as owner of certain property which it had the right to acquire, the presumption of law is, that it was lawfully acquired, where the manner of its acquisition does not appear from the com-

<sup>1</sup> *State v. Commissioners of Mansfield*, 23 N. J. L. 510; Compare *First Parish in Sutton v. Cole*, 3 Pick. (Mass.) 232.

<sup>2</sup> *Overmyer v. Williams*, 15 Ohio, 26.

<sup>3</sup> *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775.

<sup>4</sup> *Eldredge v. Smith*, 34 Vt. 484; *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137; *Plymouth R. R. Co. v.*

*Colwell*, 39 Penn. St. 337; *Black v. Del. &c. Canal Co.*, 24 N. J. Eq. 130.

<sup>5</sup> *Old Colony R. R. Co. v. Evans*, 6 Gray (Mass.), 25.

<sup>6</sup> *Lyde v. Eastern Bengal Ry. Co.*, 36 Beav. 10.

<sup>7</sup> *Farmers' Loan & Trust Co. v. Curtis*, 7 N. Y. 466; *Chautauque Co. Bank v. Risley*, 19 N. Y. 369; *Ex parte Peru Iron Co.*, 7 Cow. (N. Y.) 540.

plaint. The defendant must aver and prove that it was obtained illegally, if he bases his defence on that ground.<sup>1</sup>

In lands taken by proceedings *in invitum*, the corporation only acquires an easement, and when it ceases to use the land for the purposes for which it was taken, or when it ceases to be necessary for such purpose, it reverts to the original owner;<sup>2</sup> but where a portion of its roadway is acquired by purchase, the fee vests in the corporation, and does not revert to the original owner upon its abandonment for railroad purposes.<sup>3</sup> The question as to whether land acquired by a railway company is necessary for its use, can be raised only by the State, and, while the company may not be authorized to acquire, it may, nevertheless, convey a good title.<sup>4</sup>

**SEC. 195. Freight Contracts: Unequal Facilities.** — At the common law, every common carrier is bound to receive goods from all persons alike, without making any personal distinctions, *without giving any unjust or unreasonable advantages by way of facilities for the carriage, or rates for transporting them*, and statutes prohibiting discrimination are held as merely confirmatory of the common law.<sup>5</sup>

That the legislature creating a railway company has the power to regulate the rates at which it shall transport both passengers and freight, is conceded, but the wisdom of establishing any arbitrary rules in this respect, which shall apply at all times and in all conditions of business is very doubtful; and it is believed that the laws of trade, the necessities of business, and the interest of the companies will be found to be the best regulators of these matters. While

<sup>1</sup> Farmers', &c. Bank v. Detroit, &c. R. R. Co., 17 Wis. 372; Yates v. Van De Bogert, 56 N. Y. 526; Norwich v. Norfolk Ry. Co., 4 El. & Bl. 397.

<sup>2</sup> Proprietors, &c. v. Nashua, &c. R. R. Co., 104 Mass. 1.

<sup>3</sup> Page v. Heinberg, 40 Vt. 81. Superfluous land purchased by a railway company may be sold by it. Milliner v. Midland Ry. Co., L. R. 11 Ch. Div. 611. And property not needed for its immediate use may be let. Thus a railway company had authority to keep steam vessels for the purpose of a ferry. It was held that such vessels, when otherwise unemployed, might be used by the company for excursion trips to the sea; though a company incorporated for the purpose of making a railroad cannot, with the dissent of one of the shareholders,

carry on a trade distinct from the purposes for which it was incorporated. Forrest v. Manchester, &c. Ry. Co., 30 Beav. 40; Brown v. Winnisimmet Ferry Co., 11 Allen (Mass.), 326.

<sup>4</sup> Natoma Water Co. v. Clarkin, 14 Cal. 544; Spear v. Crawford, 14 Wend. (N. Y.) 20.

<sup>5</sup> Messenger v. Penn. R. R. Co., 36 N. J. L. 307; Sinking Fund Cases, 99 U. S. 719. Kutu v. Michigan, &c. R. R. Co., 1 Biss. (U. S. C. C.) 35; Michigan, &c. R. R. Co., 33 Mich. 6; Messenger v. Penn. R. R. Co., 37 N. J. L. 531; Rogers Locomotive Works v. Erie R. R. Co., 20 N. J. Eq. 379; Union, &c. Co. v. Erie R. R. Co., 37 N. J. L. 23; New England Express Co. v. Maine Central R. R. Co., 57 Me. 188.

companies of this character, in consideration of the great prerogative privileges conferred upon them, should be required to serve the interests of the public as far as possible, yet the strong prejudices which have grown up against them are generally predicated upon the erroneous idea that the business is very profitable, when experience has demonstrated that the direct reverse of this is the rule, and that railway stocks and securities are generally the most unreliable, unsafe, and unremunerative investments to be found in the market. As before stated, while regulatory legislation is undoubtedly constitutional, and in many instances necessary, as a rule it will be found that the interests of the corporations and of the public will be best served by leaving them to the regulating influences of the immutable and invincible laws of trade, instead of antagonizing and crippling them by hostile legislation and a consequent hostile public sentiment. Under the common-law rule, as well as under confirmatory statutes, in order to make out that a railway company has not afforded "reasonable facilities" for the carriage of freight for all, a *public inconvenience* rather than a private or individual grievance must be shown.<sup>1</sup> In order to constitute an undue or unreasonable preference, it must be shown that every person does not have the same facilities for forwarding goods that are afforded to other parties. Thus, where a railway company permitted a carrier, who also acted as superintendent of their goods traffic, to hold himself out as their agent for the receipt of goods to be carried by their line, and his office as the receiving office of the company, and goods were received by him at that place without requiring shippers to sign conditions which the company required all other shippers bringing goods to their station to sign, it was held to amount to an undue preference which was wholly unwarrantable.<sup>2</sup>

The same rule was adopted where a company closed their offices at a certain hour, and refused to receive goods tendered to them after, with the proper amount of carriage, while at the same time they continued to receive goods of the same class, prepared in the same manner, from a particular individual;<sup>3</sup> also where a company admitted into their stations their own vans with goods to be forwarded that night, at a later hour than they admitted those of other

<sup>1</sup> *Barrett v. Great Northern Ry. Co.*, 1 C. B. N. s. 423; *Bendell v. Eastern Counties Ry. Co.*, 2 id. 509.

<sup>2</sup> *Baxendale v. Bristol, &c. Ry. Co.*, 11 C. B. N. s. 787.

<sup>3</sup> *Garton v. Bristol, &c. Ry. Co.*, 1 B. & S. 112.



persons;<sup>1</sup> and it is doubtful whether the railway company would have been justified in giving such preference to themselves to the exclusion of other carriers, even though it was necessary in order to enable the general public to have the benefit of sending late parcels.<sup>2</sup>

**SEC. 196. Preference in delivering Goods.**—In the same way a company is guilty of undue preference when they favor any particular person in the *delivery* of goods. Thus, where a company employed an agent to receive goods arriving at the C. station, and deliver them to the consignees in the town of C., and refused to deliver at the station to carriers who had general written orders from persons in the town authorizing delivery of goods arriving for them, but required written orders specifying the goods, the court held this to be an undue preference to the company's agent.<sup>3</sup> In determining whether or not an undue preference has been given either in the receipt or delivery of goods, regard must be had not only to the convenience of the public, but also to the convenience of the company. Thus, where a company, because of the increase of its business, was compelled to separate its mineral from its goods traffic at its O. station, and transferred the former to another station, but retained the mineral traffic at O. so far as regarded the coals of the corporation of M., whose gas-works were near that station, and communicated with it by a siding so that traffic could be removed at once, it was held that the preference was not undue.<sup>4</sup> Any arrangement in favor of one class of vehicles entering their station yards, over others of the same class, is an undue preference, where it is shown that there is no such want of space as to warrant it, and that public inconvenience is thereby occasioned.<sup>5</sup>

**SEC. 197. Discrimination: Undue preference as to Freights.**—The question of undue preferences arises most frequently in reference to the rates charged for the transportation of goods. It may be said that the rule is, both at common law and under most of the regulatory statutes, that *under like circumstances, and for the same class of goods, the same rates should be charged to all.*<sup>6</sup> Railways are held to the strict-

<sup>1</sup> *Palmer v. London, Brighton, & South Coast Ry. Co.* L. R. 6 C. P. 194.

<sup>2</sup> *Palmer v. London & South Western Ry. Co.*, L. R. 1 C. P. 588.

<sup>3</sup> *Parkinson v. Great Western Ry. Co.*, L. R. 6 C. P. 554; *Fishbourne v. Great Southern, &c. Ry. Co.*, 19 Sol. Jour. 859.

<sup>4</sup> *Lees v. Lancashire, &c. Ry. Co.*, 18 Sol. Jour. 629. See also *Cooper v. London,*

*&c. Ry. Co.*, 4 C. B. N. s. 738; *West v. London, &c. Ry. Co.*, L. R. 5 C. P. 622.

<sup>5</sup> *Marriott v. London, &c. Ry. Co.*, 1 C. B. N. s. 499.

<sup>6</sup> *Ragan v. Aiken*, 9 Lea (Tenn.), 609; 42 Am. Rep. 689; *Johnson v. Pensacola, &c. R. R. Co.*, 16 Fla. 626; 26 Am. Rep. 781.

est impartiality in the conduct of their business, in withholding all privileges or preferences from one customer which are not extended to all others. But this rule is subject to the qualification, that where a rate of freight is reasonable for all customers, contracts for a less rate may be made in special cases, when, under all the circumstances, the discrimination is reasonable and just. The discrimination must not subject others to unreasonable disadvantages, nor must it be made in order to give one individual a preference, to the disadvantage of another, or to give preference and advantage to one locality to the prejudice of another locality. A mere discrimination in favor of a customer is not unlawful unless it is an unjust discrimination.<sup>1</sup> But for the purpose of securing freights which would otherwise go by another route, especially where the freighter lives at a distance from its route, a discrimination in rates may be made in his favor, provided its rates to persons not similarly situated are reasonable.<sup>2</sup> So, too, *it may discriminate in rates, in favor of persons*

<sup>1</sup> *Houston & Texas Central R. R. Co. v. Rust*, 58 Tex. 98. In *Cumberland Valley R. R. Co.'s Appeal*, 62 Penn. St. 218, three plaintiffs filed a joint bill against a railroad company, averring injury to their business in charging improper tolls, making discrimination against them, etc. It was held that a community of interest in the plaintiffs is necessary to sustain the bill. One plaintiff who was not especially injured in the matters charged was held not to have any *status* in court, and could not complain that the company had exceeded its franchises. Unless it appears upon the face of the bill that there is a private injury, it is demurrable as to that. A charge against a railway company for violating a public franchise, being an injury common to the whole public, is a matter for the public and not for an individual to redress. The rule is that where the injury is not greater to the individual than to the whole public, the remedy is with the public. A railroad company had authority to place cars on its road or to permit individuals to place cars thereon, and to charge "on all goods, etc., transported on its road not exceeding four cents a mile per ton for toll and three cents for transportation." It was held that these were two subjects of charge, one for the use of the road and the other for power; and that on a railroad, equality must exist in rates of transpor-

tation and, as far as possible, in accommodation; and that it cannot discriminate in favor of itself or any of its employes as against other transporters.

<sup>2</sup> In *Ragan v. Aiken*, *ante*. By the ninth section of the act incorporating the *Rogersville R. R. Co.*, it was provided that said railroad company should be governed by the provisions of the *Nashville & Chattanooga Railroad charter*, and should have the same rights and privileges, and be under the same penalties and restrictions as said company. By the fourteenth section of the act incorporating the *Nashville & Chattanooga Railroad Company*, it is provided that the charges for transportation on said road shall not exceed thirty-five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger. The *Rogersville & Jefferson Railroad Company* was organized under its charter, and built a road from *Rogersville* to a point on the line of the *East Tennessee, Virginia, & Georgia Railroad*, a distance of fifteen miles, which it equipped and operated for several years by carrying freights and passengers as a common carrier. It had however received State aid under the act of February 11, 1852, and subsequent acts amendatory thereof, whereby a statutory lien or mort-

*shipping large quantities of freights, over those shipping small quantities only.*<sup>1</sup> In the New Hampshire case last cited, ALLEN, J., said:

gage was created in favor of the State upon the entire road, stock, equipments, superstructure, franchises and property of the company, as security for the bonds of the State issued to the company and the interest thereon. The company having failed to meet its obligations under the contract with the State, such proceedings were taken by the State against the company that by order of court the road, with all its property, effects, and franchises, was, on the 20th of March, 1872, sold to the East Tennessee, Virginia, & Georgia Railroad Company, and the sale was confirmed on November 18, 1873. On December 26, 1873, the purchaser sold and conveyed the road, with all its property, franchises, and privileges, to W. P. Elliott, and on September 12, 1877, Elliott sold and conveyed the same property to the defendant, Aiken, who has since operated the road under the charter. The complainants were merchants in Rogersville, engaged in buying and selling hardware, family groceries, produce, implements of husbandry, etc., and have been so carrying on business since the 1st of January, 1879. During this period they had been required by the defendant to pay as freight for articles carried on said road of fifteen miles from Rogersville to the East Tennessee, Virginia, & Georgia road from twenty to twenty-five cents per hundred pounds on heavy articles (no articles of measurement having been shipped to them), and paid him accordingly, the gross amount of their payments aggregating about \$4,000. The court said: "The complainants insist, that under the charter of the company, the legal rate of freight for the length of said road would only be five and one-quarter cents per hundred pounds, and the main object of the bill is to recover the excess of payments over the legal rate of charge. The bill further states that the defendant, as an inducement to other merchants in Lee county, Virginia, and Hancock county, Tennessee, to have their goods shipped to Rogersville, so as to pass

over his road, has entered into a contract with those merchants not to charge them exceeding fifteen cents per hundred pounds on any and all articles for carriage on his road, and that large shipments have accordingly been made over the road to these merchants. The complainants allege that this discrimination is illegal, and ask the court to enjoin the defendant from so discriminating. The demurrer raises the questions whether the defendant is liable to the suit individually instead of the corporation, and whether the charges of freight and discrimination complained of are authorized by the charter of the Rogersville & Jefferson Railroad Company. The third ground of demurrer is that the facts stated in the bill do not show a case of improper discrimination within the meaning of the franchises under which the defendant is operating his road. The facts are that the defendant, to induce merchants in Lee county, Virginia, and Hancock county, Tennessee, to ship over his road, instead of taking a different route, has entered into a contract with them not to charge exceeding fifteen cents per hundred pounds on their goods. And the question is whether the defendant can make such a contract, under the circumstances stated. The English authorities hold that at common law the common carrier is not bound to carry at equal rates for all customers in like condition. The authorities are collected in *McDuffee v. Portland & Rochester R. R. Co.*, 52 N. H. 430; 13 Am. Rep. 72. In this country, the courts have generally held otherwise, and that statutes prohibiting discrimination are merely declaratory of the common law. *Sinking Fund Cases*, 99 U. S. 719; *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L. 407, 531; 13 Am. Rep. 457. Discrimination in rates of freight, if fair and reasonable, and founded on grounds consistent with the public interest, are allowable. *Hersh v. Northern, &c. R. R. Co.*, 74 Penn. St. 181; *Chicago, &c. R. R. Co. v. People*, 67 Ill. 11; *Fitchburg*

<sup>1</sup> *Concord & Portsmouth R. R. Co. v. Forsaith*, 59 N. H. 122; 47 Am. Rep. 122;

*Ransome v. Eastern Counties Ry. Co.*, 1 C. B. N. s. 437.

"The statute requires that 'the rates shall be the same for all persons and for like descriptions of freight between the same points;' and that all persons shall have reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents, and servants, and of any merchandise and other property, upon any

*R. R. Co. v. Gage*, 12 Gray (Mass.), 393. The important point to every freighter is that the charge shall be reasonable; and a right of action will not exist in favor of any one unless it be shown that unreasonable inequality had been made to his detriment. A reasonable price paid by such a party is not made unreasonable by a less price paid by others. Or, as said by CROMPTON, J., to the plaintiff, upon the trial of such a suit: 'The charging another party too little is not charging you too much.' *Garten v. B. & E. R. R. Co.*, 1 B. & S. 112, 154, 165; *McDuffee v. Portland & Rochester R. R. Co.*, 52 N. H. 430; 13 Am. Rep. 72. In determining whether a company has given undue preference to a particular person, the court may look to the interests of the company. *Ransome v. Eastern Counties Ry.*, 1 C. B. N. s. 437; *id.* 135. In other words, if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may nevertheless lower the charge of another person, if it be to the advantage of the company, not inconsistent with the public interest, and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place, and in the same condition. His object was to get business for his road from persons at a distance from its terminus, which otherwise would reach their destination by a different route. Under these circumstances we cannot see that the contracts complained of are against public policy, or that the complainants have been damaged, if the charges on their goods were reasonable. The bill contains no allegation that the charges made against and paid by the complainants were unreasonable. Without such an averment there has been no damage. The third ground of demurrer was

therefore well taken.' But in England the rule is otherwise. Thus, three firms of brewers carried on business at B., and their premises respectively were connected with the M. Railway. The plaintiffs were not connected with either the M. Railway or the defendant's railway. In order to prevent the traffic of the three firms from passing wholly over the M. Railway and to divert some portion of it to its own line, the defendant agreed to cart goods gratuitously between its station at B. and the premises of the three firms respectively, and it also allowed certain deductions from the rates charged to the three firms for the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the defendant gratuitously. The defendant did not cart gratuitously for the plaintiff between his premises and the station, and it did not allow to him deductions similar to those allowed to the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before mentioned, the defendant derived a profit from the traffic, and it had not any intention to prejudice the plaintiff. It was held, affirming the judgment of the queen's bench division, that the gratuitous carting, loading, and unloading of the goods for the three firms was an inequality in favor of them and an undue preference granted to them by the defendant, and was in contravention of 8 and 9 Vict., ch. 20, § 90, and 17 and 18 Vict., ch. 31, § 2, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendant, which represented the cost of carting his goods between his premises and the station at B., and of loading and unloading the same. *Evershed v. London & North-western Ry. Co.*, L. R. 3 Q. B. Div. 134; 20 Eng. (Moak) 323; *London & North-western Ry. Co. v. Evershed*, L. R. 3 App. Cases, 1029; 24 Eng. (Moak) 625.

railroad owned or operated in this State,<sup>1</sup> is in general a declaration of the common-law doctrine of reasonable compensation; and no construction which establishes an arbitrary rule inconsistent with reasonable equality in rates can be given to the statute. Absolute equality in the price rate per ton for the carriage of all merchandise of the same description, over equal distances, is not required, but a price rate which shall be reasonably equal for all. By enacting that 'the rates shall be the same for all persons, and for like descriptions of freight between the same points,' the legislature could not have intended an equality that is absolute, fixed, and unvarying, if such equality is unreasonable. To find the true construction of the statute, and the correct meaning of the terms used, the whole section must be considered together. The first clause, requiring that the rates shall be the same, is illustrated and explained by the second clause, requiring that 'all persons shall have reasonable and equal terms,' etc. Taken together, it is plain that no arbitrary rule of absolute equality, but one of reasonable and just equality, was intended. By the fifth section of the same chapter, the amount of passenger travel is recognized as an element in the question of reasonable compensation for passenger transportation, and it is no less material in freight than in passenger carriage. It cannot be presumed that the legislature intended that section two should be in conflict with the common-law doctrine of section five, nor that the first part of section two should be at variance with the rest of that section. And it has been decided that the sale of tickets to passengers before entering the cars, at a price less than that required of those who afterward pay, is not an unreasonable discrimination against the latter.<sup>2</sup>

"The terms of the statute must receive the interpretation which long-established usage and the custom of the commercial world have given them. That custom, in all branches of business, always has been, and is, to move, care for, and sell a large amount of a given commodity, in one parcel or in a given time, at a less price rate per pound, yard, or ton, than a smaller quantity of the same commodity, distributed in many and smaller parcels, at different times. The expense of handling, carrying, and storing the smaller amount is much greater, *pro rata*, than that of the same operations upon the

<sup>1</sup> Gen. Stat. ch. 149, § 2; Gen. Laws, ch. 163, § 2; *McDuffee v. Railroad*, 52 N. H. 430, 457; 13 Am. Rep. 72.

<sup>2</sup> *Hilliard v. Goold*, 34 N. H. 230.

larger amount in one body; and a discrimination in favor of the larger dealers is not inequality, but reasonable equality. By any other construction the statute would defeat itself; for taking into account the lessened expense, *pro rata*, for transporting the greater amount of property in a single body or in a given time, the carrier would, by absolute equality of rates for all cases, receive a greater price rate for carrying the larger quantity than the smaller, and thereby make an unjust discrimination against the person transporting the larger quantity of goods. *Unreasonable equality is inequality.* The regulation of the plaintiffs, demanding a greater rate for the carriage of the defendants' goods than for the carriage of the goods of other persons who furnished a larger amount than the defendants in a given time, was not unequal nor unlawful, unless it was an unreasonable discrimination against the defendants. What is reasonable equality in the rates for the carriage of merchandise of the same description between the same points, and whether or not the rates established and demanded of the defendants were reasonably equal, are questions of facts, to be found on all the circumstances of the case at the trial term."

So, too, *it may discriminate in favor of one class of goods, over others of a different class*; and by goods of the same class are meant those *which are similar in those qualities which affect the risk and expense of carriage*, and are conveyed under the like circumstances, where the labor, risk, and expense, are, in the opinion of the jury, the same;<sup>1</sup> so that, in order that the charges may differ, there must be a difference of services rendered, or of circumstances in respect of their passage over the rails.<sup>2</sup> It would not be justified in favoring one customer in competition with another. Thus, in one case,<sup>3</sup> a company had made arrangements with A. to carry coal for him during three years, from Peterborough to various places on their line of railway, at certain rates; B., a coal dealer at Ipswich, whose coal came to him by sea, sent coal to various places on the same line, and the company charged him a much higher rate than was paid by A. in proportion to the distance the coal was carried,—the professed object of the difference being to enable A., whose coal came to him by railway, to compete in the coal trade of the district with B., who had the advantage of having his coal brought to

<sup>1</sup> WILLES, J., in *Great Western Ry. Co. v. Sutton*, L. R. 4 H. L. 226.

<sup>2</sup> *London, &c. Ry. Co. v. Evershed*, L. R. 3 App. Cas. 1029.

<sup>3</sup> *Ransome v. Eastern Counties Ry. Co.*, 1 C. B. N. s. 437.

him by sea. It was held an undue preference. But the court laid down the doctrine that in determining whether any unreasonable preference had been given, "*the courts may take into consideration the fair interests of the railway itself*," and that as bearing upon the question, the circumstance *whether the company might not carry larger quantities, or for longer distances, at lower rates than smaller quantities for shorter distances, so as to derive equal profit to itself*. Nor, in England, can it justify a discrimination as to rates upon the ground that it helps to introduce a new traffic over its line, *unless it is also shown that the pecuniary interests of the company are thereby affected*; <sup>1</sup> nor, it seems, to buy off a rival scheme. Thus, a company, under a threat from a coal company that unless it would haul their coal at lower rates, it would construct another railway, and to prevent the building of such road, gave the coal company lower rates than it gave to other dealers, and the court held that it was an unreasonable discrimination.<sup>2</sup> Nor will a difference of rates be justified on the ground that one customer has natural advantages over others on the line, and that the rates charged to him only bring him on an equality with others less favorably situated.<sup>3</sup> Thus, if A. and B. are each the proprietors of a coal mine, and both send their coals to the same market, — A.'s mine being within *twenty* miles of the market, and B.'s *forty* miles; in order to place A. and B. on an equality in the market, the company would not for this reason alone be justified in charging A. the same rates for hauling his coals to the market, that are charged to B., as this would be a palpable inequality of rates, to deprive A. of his natural advantages.<sup>4</sup> But where there is a competing line from B. and not from A., and the competing road carries the freight from B. at the same rates that it is carried from A., the company would be justified in making such discrimination. Thus the Allegheny Valley Railroad crosses the Pennsylvania Railroad at Allegheny Junction. To compete more successfully with the river transportation, the Allegheny Valley Railroad Company carried crude oil to the refineries at Pittsburgh, and the manufactured product back to Allegheny Junction, at a uniform rate, thus giving to the refiner at Pittsburgh as favorable terms as if located at Alle-

<sup>1</sup> Oxlade v. North Eastern Ry. Co., 1 C. B. N. s. 454. But if the company is to gain business thereby, is not this of itself sufficient proof of pecuniary interest to justify the company in making special rates? Ragan v. Aiken, ante.

<sup>2</sup> Hawes v. Cockermouth, &c. Ry. Co., 3 C. B. N. s. 693.

<sup>3</sup> Ransome v. Eastern Counties Ry. Co.,

<sup>4</sup> C. B. N. s. 135.

<sup>4</sup> Ransome v. Eastern Counties Ry. Co., ante.

gheny Junction, and thereby securing a uniform rate on oil from the oil regions to the sea-board. It was held that to deny the right to make such an arrangement would be an unwarranted interference with the management of the business of the railway, and deprive the public of the benefit of the competition to which it is justly entitled. Railway companies have an undoubted right to enter into a just and fair arrangement with a corporation or association whereby their business will be increased, although the effect of the arrangement may be to take business from others. *With a view of increasing their business, they may extend more favorable terms to all shippers, although others engaged in the same business may be incidentally injured thereby.* The fact that the public patronize those lines of transportation which give the most favorable terms constitutes no ground of complaint.<sup>1</sup>

A company cannot make less rates to a person because the shipper employs its agent. Thus, where a company advertised to convey goods from A. to C. being over its own line and that of another company, at the rate of 50s. a ton *provided they were consigned by and to their own agent* at those places, but if consigned through any one else they charged 52s. 6d. per ton, it was held to be an unreasonable preference.<sup>2</sup>

<sup>1</sup> *Munhall v. Pennsylvania R. R. Co.*, 92 Penn. St. 150.

<sup>2</sup> *Baxendale v. North Devon Ry. Co.*, 3 C. B. N. S. 324. In England it is held that the company, when engaged in a separate trade, cannot give a preference in rates to itself. Thus, where a company possessed of a line from B. to C. advertised to convey goods from A. to C. in conjunction with another company, at the rate of 50s. per ton, *provided they were consigned by and to their own agent* at those respective places, but if consigned through any one else they charged 2s. 6d. per ton more, it was held an undue preference. *Baxendale v. North Devon Ry. Co.*, 3 C. B. N. S. 324. A company may not give an undue preference even to itself in respect of a trade independent of the railway. In *Baxendale v. Great Western Ry. Co.* (28 L. J. C. P. 81; 5 C. B. N. S. 336, — Reading case), a railway company formerly charged a uniform rate of 3s. 6d. per ton on all goods conveyed on their line between R. and P. The goods were collected and delivered both by the company and

by B. at a charge of 4s. 10d. per ton. The company, who had power under their acts to impose their own rates of charge for carrying, but no power to impose tolls for collecting and delivering, raised the charge for carrying to 8s. 4d., being the aggregate of the above charges, with an intimation to the public that they would collect and deliver goods free of all charge. The real purpose of this arrangement was to compel persons desiring to have their goods conveyed by the railway to employ the company to collect and deliver such goods, and thus to secure this business and the profits upon it, as well as to exclude B. from competing with them in this department of business. It was held that this arrangement was an undue preference to the company in their separate capacity of carriers other than on the line of railway, and also an undue prejudice to B. The ground of decision was, that where a company carries on some other business, they must in respect of such business be taken to be *quoad* the railway in the position of third parties; and see *Garton v.*



SEC. 198. *Circumstances justifying a Preference.*—It was early decided in England that when the statute speaks of “undue or unreasonable preference or advantage,” &c., it implies that there may be advantage to one person or to one class of traffic that would not be within the statute,<sup>1</sup> and that in considering such questions the court ought to take into account the fair interests of the railway company;<sup>2</sup> and the adequacy of the consideration given to the railway company in return for the advantages afforded to the person preferred;<sup>3</sup> and the fact whether or not they are willing to afford equal treatment to all persons under the like circumstances.<sup>4</sup>

A company may regulate charges according to the relative expense to themselves, and mere inequality of charge does not conclusively show that there is an undue preference.<sup>5</sup> The company may

Great Western Ry. Co., 5 C. B. N. s. 669; *Baxendale v. Great Western Ry. Co.*, 16 C. B. N. s. 137. But in *Baxendale v. Southwestern Ry. Co.*, L. R. 1 Ex. 37, the defendants were in the habit of carrying goods from London to the Isle of Wight, by their own railway from London to Southampton, and thence by tramway and steamer; the plaintiffs also carried from and to the same points, using the defendants' line from London to Southampton, and thence by carts and steamer; the plaintiffs claimed to have their goods carried by the defendants from London to Southampton at a sum equivalent to the defendants through charge from London to the Isle of Wight, less a fair charge for collection in London and for carrying it from Southampton station to the Isle of Wight; it was held that they were not entitled to this,—the delivery beyond their line not being auxiliary to their business as carriers on their own line, and therefore differing from a case of delivery in the immediate neighborhood of a station. See also *Cumberland Valley R. R. Co.'s App.*, 62 Penn. St. 218.

<sup>1</sup> *Nicholson v. Great Western Ry. Co.*, 5 C. B. N. s. 366.

<sup>2</sup> *Ransome v. Eastern Counties Ry. Co.*, *ante*.

<sup>3</sup> *Nicholson v. Great Western Ry. Co.*, *ante*.

<sup>4</sup> But see *Diphwys Casson Slate Co. v. Festiniog Ry. Co.*, 32 L. T. N. s. 271.

<sup>5</sup> Reasonableness does not depend upon the profits which the company may make,

but upon what is reasonable to be charged to the person making the payment. *Canada Southern Ry. Co. v. International Bridge Co.*, L. R. 8 App. Cas. 723. In *Campbell v. Marietta, &c. R. R. Co.*, 23 Ohio St. 168, where a railway was authorized to charge not exceeding five cents per ton per mile when the same is transported *thirty* miles or more, and for freight transported a less distance such reasonable rate as may be from time to time fixed by the company, it was held to be unreasonable to fix a greater rate for a less distance than thirty miles, than the maximum allowed for the full thirty miles. Where two railways are consolidated under a statute permitting the same, each charter containing different provisions as to freight charges, each charter remains in full force after the consolidation, as to its portion of the road, and the provisions of each as to freight, etc., must be regarded. *State v. Mobile, &c. R. R. Co.*, 50 Ala. 321; *Campbell v. Marietta, &c. R. R. Co.*, 23 Ohio St. 168; *Mobile, &c. R. R. Co. v. Steiner*, 61 Ala. 559. In Alabama, where the statute allows a difference of fifty per cent to be charged for local over through freight, the rate charged for the carriage of freight the whole length of its road furnishes the basis,—that is, for freight taken on at one terminus and discharged at the other,—the prevailing rates therefor at the time of the shipment furnish the basis. *Mobile, &c. R. R. Co. v. Steiner, ante*; *State v. Montgomery, &c. R. R. Co., ante*.

impose a scale of charges on goods of a particular character different from that on goods of another character, or on goods over one part of their line different from what is charged over another part of the same line, without a desire to favor any particular kind of traffic or any particular individual, but influenced only by a consideration of the expense of carriage. And a company will be justified in carrying goods for one person at a less rate than that at which they carry the same description of goods for another person, *if there are circumstances which render the cost to the company of carrying for the former less than the cost of carrying for the latter.*

It is open to a railway company to make a bargain with a person, *provided they are willing to make the same bargain with any other person, though that other may not be in a situation to avail himself of it.* If a million tons are carried for A. at a certain rate, B. may demand the same rate for the same quantity, though he never will, nor can, avail himself of it, because his dealings are too small.<sup>1</sup> So, a company may make a proportionately less charge per ton for goods carried a greater than for goods carried a less distance.<sup>2</sup> Nor is it an undue preference for a company to carry at a lower rate in consideration of *a guaranty of large quantities and full train-loads at regular periods*, provided the real object of the company is greater remunerative profit by the diminished cost of carriage, — although the effect is to exclude from the lower rate persons who cannot give the guaranty.<sup>3</sup>

It may happen that a scale of charges and other terms and conditions are so arranged for short distances, small quantities, &c., as to be excessive, unfair, and unreasonable, as *compared* with the terms granted for large quantities, long distances, etc.; and the court intimated that if this point had been raised in a case referred to,<sup>4</sup> it would have felt bound to submit these matters to a detailed investigation by an engineer or traffic-manager of a railway, who would be able by calculation to arrive at a satisfactory result, upon the principles recognized by railway companies of obtaining the greatest quantity of work from an engine, plant, and staff, at the least expense. In other words, the court, while recognizing the principle that the

<sup>1</sup> Evershed v. London & Northwestern Ry. Co., L. R. 3 Q. B. D. 135, per BRAMWELL, L. J.

<sup>2</sup> Strick v. Swansea Canal Co., 16 C. B. N. s. 245; Foreman v. Great Eastern Ry. Co., 19 Sol. Jour. 774.

<sup>3</sup> Nicholson v. Great Western Ry. Co., 5 C. B. N. s. 366; Greenop v. South-eastern Ry. Co., 20 Sol. Jour. 830.

<sup>4</sup> Nicholson v. Great Western Ry. Co., *ante.*

cost of carriage to the company being less in some cases than others, and other circumstances, may be grounds for graduated and varying charges, has indicated that it is prepared to ascertain that even the varying scales and terms are *relatively* fair and reasonable, so that even those who cannot guarantee the most favorable terms may not be charged more than proportionately higher rates.

For the convenience of their traffic, companies are sometimes obliged to divide their area into districts, with distinct rates and arrangements applicable to each; yet if such districts are arranged for the convenience of the company and not to give any preference or partiality, the court will not interfere. Thus, where a railway company had created districts in which they carried coals at reduced rates for quantities not less than full train-loads of 200 tons, and so adjusted those districts that the places where the complainants, the Ipswich dealers, traded were distributed into three districts, in each of which the traffic was, in consequence of such division, insufficient to enable them to send the required quantity, and avail themselves of the lower rates, the dealers alleged that in order to take advantage of the reduced rate, they would necessarily (in consequence of the parts to which they traded having been put into three districts) have to send three separate full train-loads from Ipswich, whereas the districts were so arranged that dealers from Peterborough had the places in which they dealt all in one district. The traffic-manager swore that these districts were arranged solely with a regard to consumption, and not with any view of preference; and the complainants did not fully and clearly show that the districts could otherwise have been arranged, nor clearly establish a case of undue preference.<sup>1</sup> The company afterwards charged the reduced rates for the carriage of coals consigned by dealers at Peterborough, in the prescribed quantities of thirty-five trucks for one such district, though not carried by the company in one train all the way, — the company, for their own convenience, in consequence of steep gradients which would otherwise have required extra steam power, detaching at an intermediate station some of the trucks from the train, and sending them on afterwards by the ordinary goods or other trains to which they might be advantageously attached. None of the coals were ever left at such intermediate station for consumption there, but were all carried to the district to which they had been so consigned. It was held that by so doing the company had not given

<sup>1</sup> *Ransome v. Eastern Counties Ry. Co.*, 4 C. B. N. S. 135.

an undue preference to the consignors at Peterborough, since the tariff being valid it was immaterial how the company carried coals most conveniently to themselves, provided the tariff was not infringed.<sup>1</sup>

Where a company has districts for through rates extending over long distances, they are not bound to vary the rates in respect of slight distances.<sup>2</sup> In conclusion it may be said that from the cases both in this country and in England it appears that the fair interests of the railway itself are entitled to consideration; but this must be understood as confined to interests in their capacity of railway proprietors, and over that part of the line in regard to which the complaint is made, and not extended to their interests in distinct capacities, or in undertakings in regard to which they virtually stand in the relation of third parties.

That due regard must be had to the circumstances which cause the trouble or expense of carrying to the company for one party, or in one case or set of circumstances, to be greater than in another, provided *perfect fairness* be shown by the company in dealing with such differences; and that due attention will be paid by the court to reasons for preferential dues arising out of long distances, large quantities, wholesale dealings with the company, and generally any other things which reduce the trouble and cost of carrying for one party as compared with another.

That preferences are unjust which are given for considerations wholly irrespective of circumstances which could make the inconvenience and expenditure for carrying the preferred party's goods less than for others; so that preferences given to compete with other carriers, or to keep out competing lines which the preferred person threatens to promote, or to induce such person to employ the company on other lines or undertakings which they have in hand, or otherwise to benefit the company, irrespective of the dues for carrying, have met with no favor from the court. So, too, it is undoubtedly true, that preferences may be made, based measurably upon the value of the goods shipped, and the rates which they can respectively afford to pay for transportation, and the relative cost thereof to the companies in view of the circumstances. Thus, iron, grain, cattle, &c., which find their way to market over long lines of railways if charged at anything approximating to local rates over

<sup>1</sup> *Ransome v. Eastern Counties Ry. Co.*,  
8 C. B. N. S. 709.

<sup>2</sup> *Lloyd v. Northampton & Banbury  
Ry. Co.* 23 Sol. Jour. 623.

such railways, would never be shipped, for the reason that their entire market value would be absorbed in freight charges, and public policy requires that all such articles as enter into every-day consumption, and are so to speak necessities of life, should be laid down in distant markets at the lowest possible rates. Therefore, such freights coming long distances, in full cars, without breaking bulk, and generally forming a mere addition to the local traffic trains over the road, it would be highly unjust and inequitable to say that railway companies shall not be permitted to carry such freight at a much less sum per ton per mile, than is charged for their local traffic. Indeed, in determining the question as to whether or not rates are reasonable, or discrimination is unreasonable or unjust, the circumstances must be looked to, the character of the freight, the distance it is to be hauled, the quantity, its value, the trouble and expense of handling, the expense of hauling, its bulk, and all the matters which form material elements in determining such questions.

**SEC. 199. Charges on branch Roads.**—It is held not to be an unjust discrimination to charge higher rates upon a branch road than is charged upon the main line.<sup>1</sup>

**SEC. 200. Where Charter gives a Corporation Power to fix Rates, Rule.**—Where a charter is subject to amendment or repeal, an act which regulates the rates to be charged for transportation over a railroad does not operate as an impairment of the obligations of a contract, although the charter provides that the corporation may by its by-laws establish such rates of toll for the conveyance of persons and property as they shall from time to time direct.<sup>2</sup> But where the charter is not subject to amendment or repeal, and a method for revising such rates is provided in the act, providing that in no case shall the rates be reduced so as to yield less than a certain per cent on the cost of the road, the legislature has no power to interfere.<sup>3</sup>

**SEC. 201. Contract made with two or more Agents is entire.**—Where a shipper applies to the local freight agent of a railroad company to get the rates of freight upon a proposed shipment of a certain amount of grain to a given point, and the agent, acting by authority, gives him the rate, and he agrees to ship at that rate and then goes to the master of trains and makes arrangements with him

<sup>1</sup> *Finnie v. Glasgow, &c. Railway*, 2 Macq. 177.

<sup>2</sup> *Illinois Central R. R. Co. v. People*, 95 Ill. 313; *Ruggles v. Illinois*, 108 U. S.

526; *Illinois Central R. R. Co. v. People*, 108 id. 541.

<sup>3</sup> NELSON, J., in *Rensselaer, &c. R. R. Co. v. Bennington & Rutland R. R. Co.*, Ms. (U. S. C. C.) 1869.

for the requisite number of cars per week for the purpose of making such shipment, this amounts to a special contract upon the part of the company to ship at the rates named, and to furnish cars in the manner agreed upon.<sup>1</sup>

SEC. 202. **Tolls, what are.**—The word “toll” as used in railway charters and statutes relating to railways is held to be a tribute paid for passage, such a sum as the company may charge, *in addition* to carriage, for transportation; and where a charter provided that the “toll on any property transported shall not exceed four cents per ton per mile and on each passenger two cents,” it did not restrict the company to that sum for the carriage of freight, etc., but was the sum in addition to such rates which the company might charge.<sup>2</sup> The right to take toll is a franchise and does not exist unless expressly conferred.<sup>3</sup>

SEC. 203. **Leased Road: Foreign Corporations, &c.: Inter-State Commerce.**—Where a corporation leases the road of another corporation, it becomes subject to all the statutory duties, obligations, and restrictions imposed upon the leasing company. Thus the Erie Railroad Company, being in the use of the roads and franchises of the Paterson and Rumapo Railroad Company, and Paterson and Hudson Railroad Company, was held bound by the rates fixed by law upon such roads.<sup>4</sup> So, too, it is entitled to all the privileges of such road. Thus, the New York Central Company having by a contract, which was construed to be a lease, run and operated the railway of another company, it was held that it had the right to charge such rates as were legal for the company owning the leased line.<sup>5</sup> So a foreign corporation, so far as it exercises its franchises in another State, is subject to its control. Thus, although the Erie Railroad Company is a foreign corporation, it is at the same time domestic, to the full extent of the powers and franchises confirmed and invested in it, in New Jersey, and in an action *qui tam*, etc., against it for taking unlawful tolls on parts of its lines in New Jersey, the company may properly be considered as a corporation of that State, and amenable as such to the provisions of the statute respecting unlawful tolls.<sup>6</sup>

<sup>1</sup> Toledo, &c. R. R. Co. v. Roberts, 71 Ill. 540.

<sup>2</sup> Boyle v. Philadelphia, &c. R. R. Co., 54 Penn. St. 310.

<sup>3</sup> Camden, &c. R. R. Co. v. Briggs, 22 N. J. L. 623.

<sup>4</sup> McGregor v. Erie R. R. Co., 36 N. J. Eq. 89.

<sup>5</sup> Fisher v. New York Central, &c. R. R. Co., 46 N. Y. 644.

<sup>6</sup> McGregor v. Erie R. R. Co., 36 N. J. Eq. 115.

But these statutes can only be operative as to freights transported to different points in the State enacting them, and can have no effect upon the rates charged for transportation from some point in the State to some point in another State; because an attempt to place such a restriction upon carriers would operate as an attempt to regulate commerce between the States, which, under the constitution, is the peculiar prerogative of Congress.<sup>1</sup> In the Iowa case cited *ante*,<sup>2</sup> this question was fairly raised and decided. In that case it appeared that the plaintiffs delivered to the defendants at Ackley, Iowa, to be shipped to Chicago, Illinois, 129 car-loads of wheat, and that the defendant fixed the price and charged for freight thereon thirty-seven cents per 100 pounds, or seventy-four dollars per car-load of 20,000 pounds, and shortly afterwards 120 cars more for which the defendant charged and received the same rates. The sum so charged and received by the defendant was in excess of the rates permitted to be charged under the statute of Iowa then in force, and the action was brought to recover such excess. The court held that the statute had, and could have no application to contracts for the shipment of freights from a point in the State to a place in another State, as the statute, if intended to have such an application would operate as an attempt to regulate commerce between the States, and would therefore be unconstitutional and void.<sup>3</sup>

<sup>1</sup> *Carton v. Illinois Central R. R. Co.*, 59 Iowa; *Hardy v. Atchison, Topeka & Santa Fe R. R. Co.*, 32 Kan., 30 Alb. L. J. 487; *Baltimore & Ohio R. R. Co. v. Maryland*, 21 Wall. (U. S.) 456; *Reading R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232; *Passenger Cases*, 7 How. (U. S.) 283; *City of Council Bluffs v. K. C., St. J., & C. R. R. Co.*, 45 Iowa, 338.

<sup>2</sup> *Carton v. Illinois Central R. R. Co.*, *ante*.

<sup>3</sup> *ROTHCOCK, J.*, said: "It is not claimed that the fixing of rates of freight shipped from one State into another is not a regulation of commerce. 'Any regulation of the transportation of freight upon the high seas, the lakes, the rivers, or upon the railroads, or other artificial channels of communication, is a regulation of commerce itself.' *City of Council Bluffs v. K. C., St. J., & C. B. R. R. Co.*, 45 Iowa, 338. This has been repeatedly held by the Supreme Court of the United

States. *Reading R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232; *Passenger Cases*, 7 How. (U. S.) 283; *State v. Wheeling Bridge Co.*, 18 id. 421; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1. There is a line of cases determined by the Supreme Court of the United States which hold that it is competent for the States, in the absence of legislation by Congress, to legislate respecting inter-State commerce. But those cases have been such as relate to bridges or dams across streams wholly within a State, police laws, laws relating to pilots of vessels, health laws, and the like. See *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713. But that court has always held that the power to enact laws upon subjects in their nature national, and not merely local, is exclusively with Congress. In *Cooley v. Board of Wardens*, *supra*, it is said: 'Whatever subjects of this power are in their nature national or admit of one uni-

In Kansas the question was also presented, and decided according to the rule stated in the text. In that case a contract was

form system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.' That the act of this State, assuming that its object and purpose was to control and regulate the shipments of freight to other States, is of the character last defined, appears to us to be very clear; and we are not without authority upon this question, and from a source which, so far as questions involving the construction of the Federal Constitution are involved, are binding upon this court, and all other courts in the Union. The legislature of the State of Pennsylvania enacted a law imposing a tax upon freight taken up within the State and carried out of it, or taken up without the State and carried within it. The Pennsylvania Railroad Company refused to pay the tax upon the ground that the law was unconstitutional and void, in conflict with the Constitution of the United States, which ordains that 'Congress shall have power to regulate commerce with foreign nations and among the several States.' In the case of the *State Freight Tax*, 15 Wall. 232, involving the validity of this act, it was held that the tax imposed thereby was upon the freight carried, and that it was a regulation of inter-State transportation or commerce among the States. The court in that case says: 'If then, this is a tax upon freight carried between States and a tax because of its transportation, and if such tax is in effect a regulation of inter-State commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States.' In *Henderson v. New York*, 92 U. S. 272, the following language is used: 'It is said, however, that under the decisions of this court there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the State, and its legislation be valid so long as it interferes with no act of Congress, or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in the *Passenger Cases*; by the decisions of this court in *Cooley v. Board of Wardens*, 12

How. 299; and by the cases of *Crandall v. Nevada*, 6 Wall. (U. S.) 35; and *Gilman v. Philadelphia*, 3 id. 713. But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree that under the commerce clause of the Constitution, or within its compass, there are powers which from their nature are exclusive in Congress; and in the case of *Cooley v. Board of Wardens*, it is said that whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.' In the case of *Baltimore & O. R. R. Co. v. Maryland*, 21 Wall. (U. S.) 456, it was determined that the charter of the Baltimore and Ohio Railroad Company for constructing and operating a branch railroad from Baltimore to Washington, upon a stipulation contained in the charter that the company should pay the State of Maryland one-fifth of the amount of money received for the transportation of passengers, was not an infraction of the Federal Constitution as being a regulation of inter-State commerce. It is there said: 'The exercise of power on the part of the State is very different from the imposition of a tax or duty upon the movements or operations of commerce between the States. Such an imposition, whether relating to persons or goods, we have decided the States cannot make, because it would be a regulation of commerce between the States in a matter in which uniformity is essential to the rights of all, and therefore requiring the exclusive legislation of Congress.' In that case the State of Maryland in granting the charter especially reserved the right to part of the earnings of the road, and the power to do so was upheld upon the principle that if the State had itself built the road and operated it, it would have been entitled to its earnings. The cases of *State v. Munn*, 94 U. S. 113; *Chicago, &c. R. R. Co. v. Iowa*, id. 155; and *Peck v. C. & N. W. R. R. Co.*, id. 164, do not appear to us to sanction the validity of



entered into in St. Louis, Missouri, for the shipment of a quantity of freight to the plaintiff from that point to Hutchinson, Kansas, for which he was charged the usual through rates, which however were in excess of the rates allowed by the statutes relative to freight charges then in force in Kansas. The action was brought to recover such excess, but the court <sup>1</sup> held that the action could not be main-

acts of the State legislature regulating the transportation of freight and passengers between the States. They merely determine the power of the States to fix reasonable warehouse charges, and reasonable charges for transportation of freight within the boundaries of the States respectively, and that when such power is exercised, although it may incidentally affect commerce between the States, yet the laws of the States are not regulations of inter-State commerce, because of such incidental results. That it was not intended in those cases to uphold legislation like that under consideration in this case, it appears to us is conclusively shown by the reasoning in the later cases of *Hall v. De Cuir*, 95 U. S. 485, and *Han. & C. R. R. Co. v. Husen*, 95 id. 465. It was also held that the fact that the contract was entire did not subject it to the laws of Iowa, but that it did prevent a recovery for the excess of charge upon the number of miles which the freight was hauled in that State."

<sup>1</sup> In *Hardy v. Atchison, Topeka, & C. R. R. Co.*, *ante*, *HORTON, C. J.*, said: "The contention is, that any statute fixing or limiting the charges for transportation of goods from a place in one State to a place in another is an attempt to regulate commerce between the States, and that such a statute is invalid as a regulation of inter-State commerce. In support of this, it is asserted that the exclusive right to regulate inter-State commerce is expressly confided by the Constitution of the United States to Congress by article 1, section 8, which declares that 'the Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' The Federal courts have established that the transportation of merchandise from place to place by railroad is commerce; that the transportation of

merchandise from a place in one State to a place in another is commerce among the States, or inter-State commerce; that to fix or limit the charges for such transportation is to regulate commerce; that a statute fixing or limiting such charges for transportation from places in one State to places in another is a regulation of commerce among the States; that the power to regulate such commerce is vested by the Constitution of the United States in Congress. *Keiser v. Ill. Cent. R. R. Co.*, 16 Am. & Eng. R. Cas. 40; *Louisville & N. R. R. Co. v. Railroad Com. of Tenn.*, id. 1; *Carton v. Ill. Cent. R. R. Co.*, 59 Iowa, 148; 6 Am. & Eng. Cas. 317, and the authorities there cited. The debatable question is, how far this power is concurrent. May a State act until its legislation is superseded or interfered with by Congress? In other words, may Kansas control or regulate, within its limits, the charges for transportation of goods shipped from another State, under a contract made in that State, to a place in this State? We suppose it will be conceded that Kansas can pass no law which seeks to fix or limit the charges for the carriage of goods over the lines of its railroads which pass over its territory, but neither originate nor terminate within it, as, for instance, goods passing from Missouri to Colorado, Texas, or New Mexico. We suppose it will be conceded, also, that it is beyond the power of Kansas to fix the whole charge for the carriage of goods from a point in the State to a point in another. This would be an attempt to give our laws an extra-territorial force. If, however, the power of Congress to regulate commerce among the States,—inter-State commerce,—which consists, among other things, in the carriage of persons and the transportation of goods from one State to another, is exclusive, then section 57 could not fix or limit the

tained, as the statute could have no application to the rates charged upon freight shipped from another State to some point in that State

charges in controversy. This question is one upon which the decisions of the Supreme Court of the United States are final. We shall therefore refer to the more important of those adjudications. In *Crandall v. State of Nevada*, 6 Wall. (U. S.) 35, a statute of Nevada which, in effect, laid a tax upon every traveller passing through or beyond its territorial limits, was adjudged to be invalid, but not on the ground that it was a regulation of inter-State commerce. Chief-Justice CHASE and Mr. Justice CLIFFORD dissented from this conclusion, and pronounced the act to be a regulation of inter-State commerce exclusively within the jurisdiction of Congress. In the case of the *State Freight Tax*, 15 Wall. (U. S.) 232, a statute of Pennsylvania which, in effect, laid a tax upon all freight taken up within the State and carried out of it, or taken up without and brought within it by any railway, was adjudged to be void. The decision was placed solely upon the ground that the law was a regulation of commerce among the States, and was invalid, although Congress had never legislated in reference to the same subject-matter. Mr. Justice STRONG, in delivering the opinion, said: 'The tax upon freight transported from State to State is a regulation of inter-State transportation, and therefore a regulation of commerce among the States. It is a rule prescribed for the transporter, by which he is to be controlled in bringing the subjects of commerce into a State and in taking them out. . . . If, then, this is the tax upon freight carried between States, and a tax because of its transportation, and if such tax is in effect a regulation of inter-State commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States. It is not necessary to the present case to go at large into the much-debated question whether the power given to Congress by the Constitution to regulate commerce among the States is exclusive. In the earlier decisions of this court, it was stated to have been so entirely vested in Congress that no part of it can be exercised by a State. It has, no

doubt, often been argued, and sometimes intimated by the court, that so far as Congress had not legislated on the subject, the States may legislate respecting inter-State commerce; yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them? For the power over both foreign and inter-State commerce is conferred upon the Federal legislature by the same words; and certainly it has never yet been decided by this court that the power to regulate inter-State as well as foreign commerce is not exclusively in Congress. . . . Inter-State transportation of passengers is beyond the reach of a State legislature. . . . Merchandise is a subject of commerce; transportation is essential to commerce; and every burden laid upon it is, *pro tanto*, a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter, because of such transportation.' In *Welton v. State of Missouri*, 91 U. S. 275, Mr. Justice FIELD said: 'It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating State legislation. . . . The fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled.' In *R. R. Co. v. Husen*, 95 U. S. 465, Mr. Justice STRONG said: 'Whatever may be the power of a State over commerce that is completely internal, it

or *vice versa*, placing their decision upon the same ground on which the Iowa court placed its decision.

can no more prohibit or regulate that which is inter-State than that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a branch of inter-State commerce is undeniable, and no attempt has been made in this case to deny it. . . . This court has heretofore stated that inter-State transportation of passengers is beyond the reach of a State legislature; and if, as we have held, State taxation of persons passing from one State to another, or a State tax upon inter-State transportation of passengers, is prohibited by the Constitution, because a burden upon it, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State. Transportation is essential to commerce, or, rather, it is commerce itself, and every obstacle to it, or burden laid upon it, by legislative authority, is regulation.' In *Hall v. DeCuir*, 95 U. S. 485, Chief Justice WAITE said: 'We think it may safely be said that State legislation which seeks to impose a direct burden upon inter-State commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. . . . If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay, more, it could prescribe rules by which a carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and and on the other another. Commerce cannot flourish in the midst of such embarrassments.' In *Telegraph Co. v. Texas*, 105 U. S. 460, WAITE, C. J., said: 'A telegraph company occupies the same re-

lation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. . . . A specific tax on each message, so far as it operates on private messages sent out of the State, is a regulation of foreign and inter-State commerce, and beyond the power of the State.' In *Steamship Co. v. Board of R. R. Commissioners*, 18 Fed. Rep. 10, Mr. Justice FIELD said: 'It was at one time a subject of much discussion, and some disagreement among judges, whether the power conferred upon Congress to regulate commerce is exclusive in its character, or concurrent with that of the States. By recent decisions, this question has been put at rest. When the subject upon which Congress can act under this power is national in its character, and admits and requires uniformity of regulation affecting alike all the States, then the power is in its nature exclusive; but when the subject upon which the power is to act is local in its operation, then the power of the State is so far concurrent that its action is permissible until Congress interferes and takes control of the subject. Of the former class is all that portion of commerce with foreign countries and among the States which consists in the carriage of persons, and the transportation, purchase, sale, and exchange of commodities. From necessity there can be but one rule in such cases for all the States, and the only power competent to prescribe a uniform rule is one which can act for the whole country. Its inaction in such cases is therefore an equivalent to a declaration that such commerce shall be free from State interference.' See also *Pullman Southern Car Co. v. Nolan*, 19 Central L. J. 369; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *The Daniel Ball*, 10 Wall. (U. S.) 565; *City of Council Bluffs v. R. R. Co.*, 45 Iowa, 338; *Passenger Cases*, 7 How. (U. S.) 283; *State of Penn. v. Wheeling Bridge Co.*, 18 id. 481; *Cooley v. Board of Wardens*, 12 id. 299; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713. From these author-

But in Illinois a different doctrine is held; and, while it is admitted that Congress has the exclusive power to regulate commerce

ities, and the cases therein cited, we think it is conclusively settled that the portion of either inter-State or foreign commerce which consists in transit or traffic,—including transportation in all forms, by land or by water, and the purchase, sale, or exchange of goods,—is national, and susceptible of a uniform plan of regulation, and is therefore under the exclusive control of Congress. Even if Congress has not seen fit to prescribe any specific rules to govern inter-State commerce, that does not affect the question. 'Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled.' *State v. Saunders*, 19 Kan. 127; *Welton v. State of Missouri*, *supra*. Our opinion is, therefore, that section 57, which was repealed by the legislature in 1883, if intended to apply to inter-State commerce, was in violation of the Constitution of the United States, and therefore void. The conclusion we have reached could not be disputed were it not for the case of *Peik v. Chicago & N. W. R. R. Co.*, 94 U. S. 164; and the language of the court in *State v. Munn*, id. 133; and *R. R. Co. v. Iowa*, id. 155. We confess it is difficult to reconcile these three cases with the principles which have been settled by the prior and subsequent course of decision of the United States Supreme Court, if they decide that until Congress acts in reference to inter-State commerce the legislature of a State may regulate the transportation of freight and passengers among the States. These cases were decided in 1876, and the opinion in the *Peik* case was delivered by Chief Justice WAITE; yet in the case of *Hall v. DeCuir*, *supra*, decided the next year, 1877, the Chief Justice quotes approvingly what was said by Mr. Justice FIELD, speaking for the court in *Welton v. State of Missouri*, 91 U. S. 282, that 'inaction (by Congress) . . . is equivalent to a declaration that inter-State commerce shall remain free and untrammelled.' Referring to those decisions, the Supreme Court of Iowa, in

*Carton v. R. R. Co.*, *supra*, uses the following language: 'The cases of *State v. Munn*, 94 U. S. 113; *R. R. Co. v. Iowa*, id. 155; and *Peik v. C. & N. W. R. R. Co.*, id. 164, do not appear to us to sanction the validity of acts of the State legislature regulating the transportation of freight and passengers between the States. They merely determine the power of the statutes to fix reasonable warehouse charges and reasonable charges for transportation of freight within the boundaries of the States respectively; and that when such power is exercised, although it may incidentally affect commerce between the States, yet the laws of the States are not regulations of inter-State commerce because of such incidental results. That it was not intended in those cases to approve legislation like that under consideration in this case, it appears to us is conclusively shown by the reasoning in the latter cases of *Hall v. DeCuir*, 95 U. S. 485, and *R. R. Co. v. Husen*, id. 465.' In the case of *L. & N. R. R. Co. v. Railroad Com. of Tenn.*, *supra*, HAMMOND, J., in commenting upon the *Peik* case, says: 'In the Wisconsin case, the next in the series of the Granger cases, the court mainly deals again with what were evidently considered by all more important questions. Circuit Judge DRUMMOND tells us that question was scarcely argued at all in the court below, and evidently it was only incidentally considered in the Supreme Court. 6 Biss. 177. The Wisconsin act, unlike ours, contained an exception which excluded from its operation all rates of charges for "carrying freight which comes from beyond the boundaries of the State, and to be carried across or through the State." Possibly, notwithstanding its terms, the act may have been construed, within the purview of this exception, not to apply to persons and property coming from other States into Wisconsin, or going from that into other States,—which was not thought, however, to be its construction in the court below, though the question whether it could so apply under the State Freight Tax cases, 15 Wall. (U. S.) 232, was re-

between the States, yet it is held that until Congress assumes to exercise this power, it may be exercised by the States.<sup>1</sup> But, while

served, and not decided in that court.' In the Peik case, the Chief Justice speaks of the power of Wisconsin to regulate its fares, etc., so far as they are a domestic concern, even though incidentally they may reach beyond the State. Clearly, a statute of the State prescribing rates of freight for goods which shall be binding upon the railroad companies with respect to goods brought from another State, is a regulation of inter-State commerce as much as a law imposing a tax upon such goods. Therefore it cannot be said that such a statute acts incidentally. It acts directly upon a commerce which is inter-State. It does not, like laws imposing a tax upon gross receipts from traffic, affect such commerce indirectly. It assumes to regulate and control it as commerce, and has no other object and design. Therefore we cannot say, as was stated in the Peik case, that said section 57, if intended to apply to inter-State commerce, merely incidentally affected such commerce. We have examined the case of the *People v. W., St. L., & P. R. R. Co.*, 104 Ill. 476. That portion of the case that is in any way applicable to this is largely based upon the construction given by that court to the three cases cited, and reported in 94 U. S. Rep. For the reasons before stated, we think the Supreme Court of the United States never intended to establish the doctrine as broadly as contended in the Illinois case. Thus far we have discussed the question presented as though Congress had remained entirely passive upon the subject. Such, however, is not the fact. In 1866 it passed an act authorizing all railroad companies to transport passengers and freight from State to State, and empowering them to receive and accept compensation therefor. It seems to us that the existence of this statute must be considered in discussing the power of a State to regulate inter-State commerce. See U. S. Stat. at Large, vol. 14, 66; Rev. Stat. of U. S. (2d ed. 1878), p. 1017, § 5258. If by this statute Congress undertook to legislate upon inter-State commerce, the exceptional decisions of the United States Supreme Court decided in 1876, including

the Peik case, do not militate in the slightest degree against the views announced herein. That each railroad company, in the case before us, issued its own way-bill to and from the connecting point with the defendant, and that each company was liable for the loss and damage occurring on its own road only, does not affect the question of inter-State commerce. From the time the goods began to be moved from St. Louis, Mo., until they were delivered at Hutchinson, in this State, they were the subject of commerce, and commerce among the States, and therefore inter-State commerce. After a careful consideration of the whole record and the important questions involved, we decide that the plaintiff is not entitled to recover."

<sup>1</sup> In *People v. Wabash, &c. R. R. Co.*, 104 Ill. 476, this question arose, and the court held that until Congress assumed the exercise of its constitutional power in this respect, the States may act. The court say: "There is no doubt in regard to the right and the power of Congress to regulate commerce among the States, but a law of a State which may incidentally affect commerce among the States has never, so far as we are informed, been regarded as falling within the inhibition of the Federal Constitution. In *Hall v. De Cuir*, 95 U. S. 487, where this question was under discussion, it is said: 'There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States.' The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, 'legislation may, in a great variety of ways, affect commerce, and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution.' It is no doubt true that the statute to prevent unjust discrimination in the rates of charges of railroad companies under which this action was brought, may affect commerce, but in our judgment it cannot be said to be a law regulating commerce among the States,

there is some reason, and some authority for this doctrine, yet the weight of authority is opposed to it; and having delegated the power

within the meaning of the Federal Constitution. The law does not purport to exercise control over any railroad corporation except those that own or operate a railroad in the State, — such companies as have domestic relations with the people of the State, — and as we understand the decisions of the Supreme Court of the United States, similar laws enacted by State authority have been upheld and sustained, although such laws may affect commerce. *Peik v. Chicago & Northwestern R. R. Co.*, 94 U. S. 164, is a case in point. The Chief Justice, in delivering the opinion of the court, as respects the question involved, said: 'The suits present the single question of the power of the legislature of Wisconsin to provide by law for a maximum of charge to be made by the Chicago and Northwestern Railroad Company for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside and carried without.' In regard to the act of the legislature being in conflict with the Constitution of the United States, the court said: 'As to the effect of the statute as a regulation of inter-State commerce, the law is confined to State commerce, or such inter-State commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-State commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without.' A similar question arose in *Chicago, Burlington, & Quincy R. R. Co. v. Iowa*, 94 U. S. 155, and it is there said: 'The objection that the statute complained of is void because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn v. Illinois*. This road, like the

warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as inter-State commerce, and until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.' But it is said the cases cited are not authority, as the question involved here did not, and could not, arise in those cases. In the *Peik* case, one of the allegations of the bill upon which complainant relied to defeat the law of the State was, 'that the 18th section is a regulation of inter-State commerce;' and in the argument before the Supreme Court one of the points relied upon, as shown in the statement of the case, was as follows: 'The act is a regulation of inter-State commerce, and for that reason unconstitutional.' In the other case, *Chicago, Burlington & Quincy R. R. Co. v. Iowa*, we find a similar allegation in the bill, and the same question raised in the argument. When a question is presented by a bill in equity, urged and relied upon in the argument, and passed upon by the court in the opinion, it cannot with reason be said that the point was not involved, and the opinion of the court on the question is *obiter*. The question was made by the pleadings, argued by counsel, and decided by the court. Under such circumstances we perceive no good reason why the decision of the court may not be relied upon as authority. The statute in question, as before observed, was not passed for the purpose or with the view of regulating commerce among the States; its object was to reach railroad companies which derived their powers to transact business from the State, — those that were organized under the laws of this State, and those that were organized in another State, and doing business in this State. The regulation imposed by the statute is a matter of domestic concern, pertaining to the people of the State and the railroads of

in this respect to Congress, it is difficult to understand how the failure of Congress to exercise the power can be construed as leaving it with the State. Having the exclusive power, Congress is made the sole judge of the *necessity* of legislating in respect to it, and if the States assume to act because Congress has not done so, they deprive Congress of its most important prerogative, to wit, its discretion in the matter. To say that Congress *must* act under the power, or the State retains it, seems to us as not only an untenable but an absurd proposition. The fact that it has not acted under it, simply raises the presumption that it deems it unnecessary to do so, and not that it has abandoned the power altogether.

SEC. 204. **Facilities to other Carriers: Express Companies.** — Railway companies are bound to extend the same facilities to other carriers, as to other customers, including the mode and rate of charges.<sup>1</sup> Thus, a railway company cannot under its charter carry on an express business,<sup>2</sup> and therefore it is bound to furnish the usual and

the State. The Wabash Railroad Company, which was sued in this case, is engaged in State as well as inter-State commerce, and as was said in the Burlington case, *supra*, 'the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be incidentally affected. Should Congress, under the provision of the Constitution which authorizes the regulation of commerce among the States, pass a law regulating the charges of all railroads engaged in inter-State commerce, it may be that the law of this State might then be confined to charges for the transportation of property wholly within the State; but no such law has been passed, and that question does not arise here.' This ruling was explained by the same court in the same case, 105 Ill. 236, as follows: 'We see no reason to depart from the conclusion reached in this case when it was here before. See *People v. Wabash, St. Louis & Pacific Ry. Co.*, 104 Ill. 476. But to avoid misapprehension, we deem it advisable to state explicitly that we disclaim any idea that Illinois has authority to regulate commerce in any other State. We understand, and simply hold, that in the absence of anything

showing to the contrary, a single and entire contract to carry, for a gross sum, from Gilman, in this State, to the city of New York, implies, necessarily, that that sum is charged proportionally for the carriage on every part of that distance, and that a single and entire contract to carry, for a gross sum, from Peoria, in this State, to the city of New York, implies the same thing; and that, therefore, when it is shown that there is charged for carriage upon the same line, less from Peoria to New York (the greater distance) than from Gilman to New York (the less distance), and nothing is shown to the effect that such inequality in charge is all for carriage entirely beyond the limits of this State, a *prima facie* case is made out of unjust discrimination, under our statute, occurring within this State. We hold that the excess in the charge for the less distance presumably affects every part of the line of carriage between Gilman and the State line, proportionally with the balance of the line.'

<sup>1</sup> *Baxendale v. Eastern Counties Ry. Co.*, 4 C. B. N. s. 63; *Southern Express Co. v. Memphis, &c. R. R. Co.*, 2 McCrary (U. S. C. C.), 570; *Wells, Fargo, & Co. v. Oregon R. R., &c. Co.*, 8 Sawyer (U. S. C. C.), 600.

<sup>2</sup> *Southern Express Co. v. Memphis,*

necessary facilities for the transaction of the business of express companies.<sup>1</sup> As common carriers they are not authorized to carry on express business, but as such carriers they are bound to provide for those doing an express business over their roads reasonable and necessary facilities for such business, *and to all upon equal terms. They cannot insist upon the exclusive right to do such business over their lines of road, nor grant such right to one express company to the exclusion of others, but are bound to carry for every one offering to do the same sort of business upon the same terms.* Where an express company had, under special contract, been for many years engaged in that business over the system of roads controlled by the defendant, and had built up a large and valuable business, and established valuable connections, all of which would be much depreciated if defendant should be allowed to refuse to further allow it to carry on such business over its line of road, it was held that for that reason an injunction restraining such action might be granted.<sup>2</sup> They are not only bound, as common carriers, to allow express companies to do business on their roads, but they are also bound to provide such conveyances, by special cars or otherwise, attached to their trains, as are required for the safe and proper transportation of express matter, and to extend the use of such facilities on equal terms to all who are engaged in the business.<sup>3</sup> And a contract to furnish daily such an excessive and unnecessary amount of space, in the cars of a railroad company, for the transportation of the express matter of any one person or corporation, as will disable such railroad from serving others equally entitled to be served in the same manner, is illegal and void. Such contract is extortionate upon the express company.<sup>4</sup> A temporary injunction will be granted to enjoin a railroad company from charging an express company higher rates than are charged to other specified companies by the same railroad.<sup>5</sup>

&c. R. R. Co., 2 McCrary (U. S. C. C.), 570. But see *Sargent v. Boston & Lowell R. R. Co.*, 115 Mass. 416.

<sup>1</sup> *Wells, Fargo, & Co. v. Oregon R. R. & Navigation Co.*, 8 Sawyer (U. S. C. C.), 600; *Dinsmore v. Railroad Cos.*, 3 Am. & Eng. R. R. Cas. (U. S. C. C.) 594; *Wells, Fargo, & Co. v. Oregon R. R. & Navigation Co.*, 18 Fed. Rep. 517; *Wells v. Oregon &c. R. R. Co.*, 18 Fed. Rep. 667.

<sup>2</sup> *Dinsmore v. Louisville, Cincinnati, &c. R. R. Co.*, 2 Fed. Rep. 465, 2 Flippin

(U. S. C. C.), 672; *Camblos v. Philadelphia & Reading R. R. Co.*, 9 Phila. (U. S. C. C.) 411.

<sup>3</sup> *Southern Express Co. v. St. Louis, Iron Mountain, & Southern R. R. Co.*, 3 McCrary (U. S. C. C.), 147, 154; *Southern Express Co. v. Memphis, &c. R. R. Co.*, 2 McCrary (U. S. C. C.), 570.

<sup>4</sup> *Texas Express Co. v. Texas & Pacific Ry. Co.*, 6 Fed. Rep. 426.

<sup>5</sup> *Southern Express Co. v. Memphis, &c. R. R. Co.*, 2 McCrary (U. S. C. C.), 570.



Where an injunction is granted requiring a railway company to furnish facilities to an express company to continue its business, the court will presume that past rates paid for such service are reasonable.<sup>1</sup> A railway company cannot lawfully fix upon an absolute rate of compensation and insist upon being paid by express companies in advance or at the end of each trip.<sup>2</sup> Nor has it any right to open and inspect packages conveyed over its road which are in charge of an express company;<sup>3</sup> and the refusal of a railroad company to carry an express company's safes and chests, unless it is allowed to open the same and inspect their contents, or is furnished with an inventory of such contents, with the further understanding that the railroad company, whenever it sees fit, may open and inspect the safes and chests of the express company, and also collect the freight on each separate article or parcel contained therein, as if each had been shipped by itself, violates both the express company's rights as a shipper, and the terms of an interlocutory judgment temporarily restraining an interference with the express company's business.<sup>4</sup> So, to refuse permission to express messengers or agents to accompany property on the steamboats or railroads on which it is to be carried, and to deny to them the right to the custody of the property while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.<sup>5</sup> Nor can it exercise a supervision over a rival company or discriminate in its own favor.<sup>6</sup>

**SEC. 205. When Notice of change of Rates should be given.**—When a freight tariff has been promulgated, shippers have a right to rely upon the rates therein given upon different classes of merchandise, etc., until notice of a change is given, and if the rates are raised without notice, a shipper is bound only to pay the tariff rates.<sup>7</sup> Rates for transportation of freight upon railroad may be established

<sup>1</sup> Wells, Fargo, & Co. v. Oregon R. R. & Navigation Co., 8 Sawyer (U. S. C. C.), 600.

<sup>2</sup> Southern Express Co. v. St. Louis, Iron Mountain, & Southern R. R. Co., 3 McCrary (U. S. C. C.), 147, 154. See also same v. Memphis, &c. R. R. Co., 2 McCrary (U. S. C. C.), 570.

<sup>3</sup> Southern Express Co. v. St. Louis, Iron Mountain, & Southern R. R. Co., 3 McCrary (U. S. C. C.), 147.

<sup>4</sup> Dinsmore v. Louisville, New Albany, & Chicago R. R. Co., 3 Fed. Rep. 593.

<sup>5</sup> Southern Express Co. v. St. Louis, Iron Mountain, & Southern R. R. Co., 10 Fed. Rep. 869.

<sup>6</sup> Southern Express Co. v. Memphis, &c. R. R. Co., 8 Fed. Rep. 799.

<sup>7</sup> Fitchburg R. R. Co. v. Gage, 12 Gray (Mass.), 393.

by the directors, or by their agents under their authority. The assent of the directors may be presumed, if nothing appears to the contrary.<sup>1</sup> Where the president of a railway company establishes and puts up tariffs of rates of fare and freight, the legal presumption is that he has acted by the authority of the corporation.<sup>2</sup> Where a printed tariff of freights is established, any printed copy may be regarded as an original. Where copies of such tariff are required by law to be posted at the depots of the railroad, that is a sufficient account of the absence of those copies to render secondary evidence admissible.<sup>3</sup>

**SEC. 206. Remedy for illegal Charges.** — Where a company charges a customer a larger sum for transportation than it is legally entitled to charge, he may recover the excess in an action for money had and received.<sup>4</sup> If a penalty is given by statute, the statutory remedy must be pursued.

**SEC. 207. Pooling Arrangements.** — In England, it is held that "pooling" contracts or arrangements between competing roads, by which they agree to divide their joint earnings upon certain classes of business, or even their entire earnings, are legal and valid,<sup>5</sup> — *where it does not appear that the interests of the shareholders or of the public are prejudiced thereby.*<sup>6</sup> But the English authorities upon many questions connected with railway law are hardly safe guides upon similar questions in this country, for the reason that their railway system is essentially different from ours, and such companies are under the direct and immediate supervision of a court of railway commissioners, which by statute is invested with authority to hear complaints and make orders, which relieve the public against any particular oppression or illegal action of the companies; yet upon this question such authorities are entitled to weight, because they are predicated upon the common law, and not upon statutory grounds. In a case involving this question,<sup>6</sup> it appeared that the London and North-Western Railway Company, and the Shropshire Union Railways and Canal Company together promoted a bill to enable

<sup>1</sup> Jeffersonville R. R. Co. v. Rogers, 28 Ind. 1.

<sup>2</sup> Hilliard v. Goold, 34 N. H. 230.

<sup>3</sup> Manchester & Lawrence R. R. Co. v. Fisk, 33 N. H. 297.

<sup>4</sup> Great Western Ry. Co. v. Sutton, L. R. 4 H. L. Cas. 226; Mobile, &c. R. R. Co. v. Steiner, 61 Ala. 559; Graham v. Milwaukee, &c. R. R. Co., 53 Wis. 473.

In Georgia it is held that there can be no recovery if the money is paid voluntarily. Du Bose v. Georgia, &c. R. R. Co., 50 Ga. 304.

<sup>5</sup> Shrewsbury, &c. Ry. Co. v. North-Western, &c. Ry. Co., 4 De G. M. & G. 22 L. J. Ch. 682.

<sup>6</sup> Hare v. London, &c. Ry. Co., 2 J. & H. 80.

the former to use a portion of the line of the latter company. This bill the Shrewsbury and Birmingham Railway Company opposed. To get rid of their opposition an agreement was entered into with the opposing company, by which the other two companies agreed to conduct their traffic in a certain specified manner, to keep certain accounts, and to pay over to the Shrewsbury Company a portion of their receipts.<sup>1</sup> This agreement gave rise to a great amount of litigation. On the opening of the Shrewsbury and Birmingham Railway, in 1847, that company called upon the London and North-Western Railway Company to keep the accounts stipulated for in the agreement; and this being refused, a bill was filed to compel them to do so. This bill was met by a demurrer on the part of the London and North-Western Railway Company, and the demurrer was allowed by the Vice-Chancellor of England, on the ground that the agreement had not come into operation.<sup>2</sup> From this there was an appeal, and Lord COTTENHAM overruled the demurrer, being of opinion that the agreement had come into operation and *was valid and binding*.<sup>3</sup> Thereupon a motion for the injunction prayed by the bill, *i. e.*, that the London and North-Western Railway Company should not carry traffic on certain specified portions of their lines, was made and granted by the Vice-Chancellor;<sup>4</sup> this, also, was appealed from, and the then Chancellor, Lord TRURO, dissolved the injunction upon the ground of comparative inconvenience, and without giving any opinion as to the merits of the case; holding that the questions, both as to the agreement having come into operation and as to its legal validity, ought to be tried at law.<sup>5</sup> An action was next brought upon the agreement,

<sup>1</sup> See the agreement at length, 2 Mac. & G. 331-335.

<sup>2</sup> 20 L. J. Ch. 90.

<sup>3</sup> 2 Mac. & G. 324; 2 Hall & T. 257; 20 L. J. Ch. 95.

<sup>4</sup> 20 L. J. Ch. 102.

<sup>5</sup> 3 Mac. & G. 70; 20 L. J. Ch. 103. See *Prudden v. Morris & Essex R. R. Co.*, 19 N. J. Eq. 386; s. c. rev'd, 20 N. J. Eq. 530; *Black v. Del. & Rar. Canal Co.*, 22 N. J. Eq. 130, 425. In *The Shrewsbury, &c. Ry. Co. v. The London, &c. Ry. Co.*, 21 L. J. Q. B. 89, Lord CAMPBELL, C. J., said: "The question, then, is, whether the agreement is void in law. As it has been clearly settled that an agreement to withdraw opposition to a railway bill for

a pecuniary or other consideration is not illegal, the agreement in question would only be void in case it was illegal upon other grounds, such as those suggested on the part of the defendants, — that it was injurious to and therefore in a legal sense a fraud upon the public or the shareholders. The defendants' counsel contended that it was injurious to the public, by giving, in effect, a monopoly to the plaintiffs, and thereby depriving the public of the benefit that might be derived from competition. If this were so, and the parties proposed by their agreement to endeavor to prevent competition generally, there might be weight in the objection; but the effect of the agreement is only that the one com-

and the Court of Queen's Bench held that it was not void, either as being a fraud on the Legislature, or as depriving the public of the benefit of competition, or as being a fraud on the shareholders.<sup>1</sup> A further motion for an injunction was then made before the Master of the Rolls, to whom the cause had been transferred; and he ultimately dismissed the bill, — or, rather, all the bills, for three cross suits were pending, — and with it the motion for the injunction.<sup>2</sup>

pany shall not compete or interfere with the other upon the particular line mentioned in the agreement; *this is no more illegal than it would be for two persons engaged in trade to agree that one shall not exercise his trade nor compete with the other within a particular district.* It was also objected that it was void, as injurious to the shareholders of the company and a fraud upon them by the stipulation to divide the profits. If such a stipulation were necessarily injurious to the shareholders the objection might be valid; but this arrangement may be greatly for the benefit of the shareholders, and without such co-operation of the two companies perhaps no profit would be made. The same objections to the validity of this agreement were urged in the case in chancery between the same parties, before the late Lord COTTENHAM, as reported in the 2d volume of McNaghten & Gordon's Reports, p. 324. The case was fully argued, and in an elaborate judgment delivered by Lord COTTENHAM, he held that there was nothing in the agreement contrary to the duty which the parties respectively owed to Parliament or to the public and their own subscribers. But before stating our entire concurrence with the judgment of the Lord Chancellor, it is necessary to advert to an objection to the legality of the agreement, which was not taken when the case was before him, or at least is not adverted to by him. The objection was founded upon the third article of the agreement, by which it is provided 'that the Shropshire Union Railways and Canal Company and London and Northwestern Railway Company, or either of them, shall not carry or convey any passengers, cattle, luggage, goods, or other matters or things from Shrewsbury or Wellington or from any point between those two places to any point or place on the line of the Shrews-

bury and Birmingham Railway, or the Birmingham, Wolverhampton, and Stour Valley Railway, nor use the line of the Shropshire Union Railways by Gnosall or Stafford to compete for any traffic which properly belongs to the Shrewsbury and Birmingham Railway.' This clause in the agreement is said to be contrary to the acts of Parliament, which contain provisions for the conveyance of her Majesty's troops and the mails by railway, obligatory on the railway companies. It may well be doubted whether the conveyance of her Majesty's troops or mails under the compulsory clauses in the statutes referred to would come within the intention and meaning of the third clause; by the terms 'passengers, cattle, luggage, goods, or other matters or things,' the parties only intending to include whatever might come within the ordinary interpretation of those terms; but we are of opinion that there is nothing in that clause in derogation of the right of the Crown to send soldiers or mails by railway to any place within the prescribed limits, as they may go by the Shrewsbury and Birmingham Railway, or the Birmingham, Wolverhampton and Stour Valley Railway to the places within the specified limits. There is nothing in the clauses of the statutes relating to the conveyance of the troops or mails which would oblige the defendants to become carriers upon particular parts of a line, which they would not otherwise be, instead of another company with whom they have engaged not to compete as carriers upon that line. Upon the whole case we are of opinion that the objections taken by the defendants cannot be supported, and that the plaintiffs are entitled to our judgment."

<sup>1</sup> 17 Q. B. 652; 21 L. J. Q. B. 89.

<sup>2</sup> 16 Beav. 441.

Against this dismissal there was an appeal to the Lords Justices, who also decided against the plaintiffs, holding that the agreement was a breach of trust on the part of the directors, as between themselves and their shareholders, and that the plaintiffs had knowingly participated in such breach of trust. They also held that the contract, being to alienate the tolls of a given portion of a railway, was contrary to the authority given by Parliament, and was against public policy; and that, therefore, whether it were valid or invalid at law, the court could not lend its assistance to enforce specific performance of the same.<sup>1</sup> The plaintiffs thereupon appealed to the House of Lords, where, finally, it was determined that whatever was the character of the covenants in question, the time had not yet come when they were to be put into operation.<sup>2</sup>

The result of these numerous judgments is thus summed up by PAGE WOOD, V.-C.:<sup>3</sup> "I think the positive opinions are only two: Lord COTTENHAM on the one hand, in favor of the legality of the agreement, the V.-C. TURNER on the other; and the present Master of the Rolls, whether bound by the weight of authority or otherwise, adheres to the view of Lord COTTENHAM and the judges at common law. In equity, the authorities stand in the manner I have described; there are only two authorities directly opposed, and the others, perhaps, may be taken to be neuter between those two contending views. Then we have the opinion of the Court of Queen's Bench, which consisted at the time of the present Lord Chancellor, Mr. Justice PATTESON, Mr. Justice COLERIDGE, and Mr. Justice WIGHTMAN; certainly a very great weight of authority is there found united in favor of the contract which there existed."

Another equally well-known, and perhaps more important as being the more recent, authority is that of *Hare v. London and North-Western Railway Company*.<sup>4</sup> Here two groups of railway companies, being respectively the owners of independent counterminous routes from London to Edinburgh, the west route and the east coast route, agreed to divide the profits of the whole traffic in certain fixed proportions, calculated on the experience of the past course of traffic. As a result of that agreement, a portion of the earnings of the London and North-Western Railway Company

<sup>1</sup> 4 De G. M. & G. 115; 22 L. J. Ch. 682.

<sup>2</sup> 6 H. L. 118; 26 L. J. Ch. 482.

<sup>3</sup> 2 J. & H. 113, 114; 30 L. J. Ch. 832.

<sup>4</sup> 2 J. & H. 80; 30 L. J. Ch. 817; *Hodgson v. Earl Powis*, 1 De G. M. & G. 6; 21 L. J. Ch. 17; *Lancaster & Carlisle Ry. Co. v. North-Western Ry. Co.*, 2 K. & J. 293; 25 L. J. Ch. 223.

was handed over to the other companies; and the plaintiff, a shareholder in this company, applied, though after several years of acquiescence, for an injunction to restrain the companies from carrying out the agreement. The application was refused. The Vice-Chancellor considered not only that on principle such an arrangement was legal, *there being in it nothing prejudicial to either the shareholders or the public*, but also that he was concluded by the judgments of Lord COTTENHAM and the Court of Queen's Bench in the Shrewsbury case: "Until that judgment is overruled by a higher authority, I think I ought to adhere to it in a case which seems to be entirely parallel."

In that case, the validity of the agreement was examined as far as it concerned companies and lines existing at the moment of its making; more recently it has been held that the rule is not to be applied to others not then existing.<sup>1</sup> The plaintiffs in that case, by extending their old line and by adding a new branch, and thence by running powers obtained over the line of the defendants, one of the parties to the agreement, had acquired, subsequently to the date of the same, a new through route from London to Edinburgh; and the suit arose in reference to the proceeds of the traffic on such new through route. KINDERSLEY, V.-C., after determining that the agreement did not either expressly or by implication include the plaintiffs, considered that if it had done so it would have been illegal: "It would be *ultra vires* of the board of directors of such a company to enter into a contract fixing and regulating the future traffic which might be carried upon a line of railway which the company might hereafter be empowered to construct, and the profits of such traffic, so as to give to another railway company an interest in such traffic and profits."

In this country, the question as to the legality of such contracts is one which, at first impression, seems easy of solution, and some authors have passed it over with a statement that they are *ultra vires*, illegal, and void, citing a New Hampshire case<sup>2</sup> as authority, without reference to the fact that the decision in that case was predicated upon a statute directly prohibiting such arrangements

<sup>1</sup> *Midland Railway Company v. London & North-Western Ry. Co.*, L. R. 2 Eq. 524. Compare *Maunsell v. Midland Great Western of Ireland Ry. Co.*, 1 H. & M. 130; 32 L. J. Ch. 513; one of the questions decided in which was,

that an agreement making traffic regulations applicable to future extensions was *ultra vires*. Green's Brice's *Ultra Vires*, pp. 419-422.

<sup>2</sup> *Morrill v. Boston & Maine R. R. Co.*, 55 N. H. 531.

between rival roads. Others have made the sweeping statement that such contracts are *ultra vires*, illegal, and void, upon the ground that they tend to create a monopoly, and therefore are contrary to the policy of the law. This proposition might be accepted without serious question except for the circumstance that most of the charters of these companies contain provisions permitting them to consolidate with any other railroad company, or to lease their road, etc., or such permission is given by general law. This being the case, the claim that the policy of the law in granting charters for rival roads was to secure a reasonable competition, which these contracts defeat, is essentially weakened, and it may with considerable propriety be claimed that the policy of the law permits companies to enter into this species of contracts to protect themselves from ruinous competition or save themselves from hopeless bankruptcy. If prohibited by law, as is the case in New Hampshire, such contracts would be *ultra vires* and void beyond question; and if permission to consolidate, lease, etc., is not given, it might be held that they are against the policy of the law, and therefore invalid, upon the ground that the granting of charters for rival lines was with a view to secure a reasonable competition, which these contracts tend to defeat. This was the view of the court in a Georgia case,<sup>1</sup> and an injunction was issued to restrain a railroad from attempting to get control of a rival road; and as the court based its ruling upon the ground stated *supra*, it would apply with equal force to contracts of any kind the object and effect of which is to destroy or prevent competition. In New York,<sup>2</sup> in a case incidentally bearing upon this question, the court said: "It is a compact between the parties, intended to affect the facilities for public travel over a route of railroad which had been or might be authorized by law. The defendants were lessees of the New Haven and Northampton railroad, then in part constructed. The lessors had covenanted not to extend the road northerly beyond Granby station (a point a little north of the Connecticut line) without the consent of the defendants, and had given over to the defendants all the franchises and corporate powers of such lessors, for the purpose of locating or constructing any railroad or extension of any railroad northerly from Granby station. By the agreement with the plaintiffs, of March 16, 1850, the defendants covenanted

<sup>1</sup> Central R. R. Co., 40 Ga. 582. The legislature subsequently permitted these roads to consolidate.

<sup>2</sup> Hartford, &c. R. R. Co. v. N. Y. & New Haven R. R. Co., 3 Robt. (N. Y.) 411.

to hold the franchises and corporate powers conveyed to them by such lease, until the 1st of July, 1869, and during such time not to extend such railroad north of Granby station. Such an arrangement was intended to prevent the extension of the N. H. & N. railroad to any point north of its terminus at Granby, and to prevent any competition in travel detrimental to the interests of the plaintiff's road — which had a monopoly of the carrying trade from Springfield and points north of Springfield *via* Northampton and Springfield road — which such extension might afford. The completion of the N. H. & N. R. R. to Northampton, would open a new line for travel southward, which would be a competitor and rival of the road of the plaintiffs. Such competition and rivalry it was not lawful for these parties to prevent, or attempt to prevent, and any contract to effectuate such purpose is void. Public policy is opposed to any infringement of the rights of travel, or of any of the facilities which competition may furnish; and the law will not uphold any agreement which does or may injuriously affect such rights or facilities."

But where by its charter or the general law a railroad company is authorized to consolidate with, or lease its road to, *any other* railroad company, upon the principle that the greater includes the less, there would seem to be some reason for holding that it might enter into a contract with a rival road by which their joint earnings upon their through traffic should be divided between them, upon such a basis as the companies could agree upon, without impugning the policy of the law, because in such a case, they only accomplish partially and indirectly what they are authorized to accomplish directly. But where as in Ohio, New York, and some other States, they are only authorized to consolidate with roads over which freight and passengers can be carried "*continuously*,"<sup>1</sup> a different question is presented; because in such cases the legislature has exhibited no intention of abandoning the policy of reasonable competition indicated by permitting the construction of rival lines. But in any event, so long as the roads keep within the limits of regulatory statutes as to rates of transportation, and the shareholders sustain no loss from such contracts, no one but the State has any ground of complaint. In a New Hampshire case<sup>2</sup> the court say: "The

<sup>1</sup> *State v. Vanderbilt*, 37 Ohio St. 590;      <sup>2</sup> *Currier v. Concord R. R. Co.*, 48  
People v. Boston, Hoosac Tunnel, &c. N. H. 321.  
R. R. Co., 12 Abb. N. C. (N. Y.) 230.



object of the law (the statute in that State) is to prevent the consolidation of rival and competing lines of railroad, by contracts or arrangements between them, by means of which competition is removed,—the purpose being to prevent the increase of the charges of such railroads beyond what might be expected under the influence of a free competition. In the promotion of this object every citizen having occasion to use such roads, or to purchase articles transported over them, has an interest; but his interest is not of a character which may be protected by a suit to recover damages. It is much like the interest which every citizen has in a public highway, its being kept in repair, and there, independent of statute provisions, he can maintain no action on account of any defect in its condition; and by statute he can maintain action only in case he suffers special damages while in the use of the road, and not for being deprived of the use of it altogether by its being permitted to become impassable.<sup>1</sup> *Upon the same principle no person has such an interest in preserving free competition between rival railroads, as to be entitled to maintain a suit for diminishing or removing such competition; but the wrong which arises from the violation of the provisions of the statute is essentially a public wrong in which no citizen has a special or private interest.*” The argument that in those States where consolidation, etc., is permitted with *any* other railroad, these contracts cannot be said to be invalid, it seems to us is conclusive, as the only ground upon which such contracts can be said to be invalid is, that they are opposed to public policy, which in other words is the policy of the law; and they certainly cannot be said to be opposed to the policy of the law, if the statute gives the companies the power to accomplish the same result in a more effectual manner. Nor is it by any means certain, in the absence of anything in the statute prohibiting them, that this class of contracts can be said to be *per se* opposed to public policy, either upon the ground that they are opposed to the spirit of the law, or as tending to injure the interests of the people by creating a monopoly, whether the statute permits a consolidation with other roads or not. As we have already seen, these contracts are upheld by the English courts, where supervision over railways by the government is far more strict than it is in this country, and these decisions are entitled to great weight in determining the validity of these contracts here.

<sup>1</sup> Griffin v. Sanborntown, 44 N. H. 246.

In a Louisiana case<sup>1</sup> this question arose in reference to an agreement between a railway and a steamboat company having the same termini, to prorate on all through freight, and its validity was sustained. In that case the defendants, owning a short railway, from New Orleans to Lake Pontchartrain, and one Morgan, owning a line of steamers plying from the lake terminus to Mobile, and the plaintiffs and other parties owning two other steamers in the same trade, an arrangement was made by the defendants with Morgan, and temporarily, with the proprietors of the other steamers, respectively, to share *pro rata* the through freight from New Orleans to Mobile. It appeared that this arrangement was unprofitable to the defendants, for the lines of steamers, by competing and lowering the rates of freight, greatly reduced the share coming to the railway. The defendant therefore entered into an agreement with Morgan by which the latter loaned the railway company \$250,000, and the former agreed to prorate with him the through freight from New Orleans to Mobile, and to charge all other steamers the rates paid by the public generally. The plaintiffs immediately laid up their steamer and sued for damages, on the ground that this prorating with Morgan and refusing to further prorate with the plaintiffs was an illegal combination with Morgan to confer on him an unlawful monopoly and preference. It was held that the acts of the defendants were not in contravention of any statute of Louisiana *or of any principle of her jurisprudence*; and that they might agree or refuse to prorate through freight with anybody.

These corporations are chartered and organized for the transportation of passengers and freight, and have authority not only to enter into contracts in respect thereto with individuals, *but also with other railroad corporations*; and the validity of contracts between different lines of railways for the transportation of passengers and freight over such railways has been universally sustained by our courts; and contracts for the *pro rata* division of fares,<sup>2</sup> and for the *pro rata* division of freights have been sustained. In a Minnesota case<sup>3</sup> the court say: "In view of the present mode of transacting business of this kind, this authority *would seem to be an incident to railroad corporations*, unless withheld by the terms of their charters; and con-

<sup>1</sup> Eclipse Tow Boat Co. v. Pontchartrain R. R. Co., 24 La. An. 1.

<sup>2</sup> Hartford, &c. R. R. Co. v. N. Y. & N. H. R. R. Co., 3 Robt. (N. Y.) 411.

<sup>3</sup> Stewart v. Erie & Western Trans. Co., 17 Minn. 372.

tracts of this kind, when made with a *bond fide* purpose to regulate traffic in a reasonable and just manner are generally held good." In a New Jersey case<sup>1</sup> a similar question arose as to a contract entered into by connecting roads for the division of fares, and the contract was sustained, the Chancellor saying: "I find no adjudication whatever in this country upon the point. Yet we know that it is, and has been for years, the constant practice of railway companies to run in connection, passing freight and passengers over a number of lines forming one route, and to divide the receipts by an arbitrary schedule fixed upon, and not always, or in most cases, giving to each line the share earned on it, and that only. In many cases, as in the present, there may be good reasons for making a difference in the division of the profits. If an advantageous arrangement can be made by a line at the south end of a route, with a line at the north end, for carrying passengers in common, which could not profitably (and therefore would not) be entered into by the north line, unless it received a larger proportion of the earnings than in proportion to its work, there is no reason or principle of law why the south line should be prohibited from making an arrangement profitable to its shareholders, on the ground that the division of earnings must be unequal. The directors of such companies have the right to make contracts as to carrying passengers and freight. They can make such contracts for one trip, for one day, for one year, or for the whole existence of the company. They can make such contracts at prices lower than those limited in their charter, and lower than charged to others. The commutation contracts constantly made on all leading roads are in exercise of this power. They are made for months, a year, and sometimes for life. Their validity is founded upon well-settled principles of law, and has never been doubted. They are made for the supposed advantage of the business and of the shareholders; and the expediency of making them must depend on the judgment of some one, and in all these corporations, the management of *all the concerns* is committed to the directors. There is nothing in such contracts against public policy or any law of this State. The want of such power would be a great injury to most railway corporations, as well as to the public, who, as in this case, are much benefited by the arrangement. Contracts by which commuters are carried for less than cost have been held good policy by railway managers, as tending to build up and populate towns along

<sup>1</sup> *Sussex R. R. Co. v. Morris, &c. R. R. Co.*, 19 N. J. Eq. 13.

their lines. They may misjudge as to the policy, but contracts thus made in good faith are valid."<sup>1</sup>

Having authority to contract with other railways in reference to rates of transportation, etc., for the benefit of the public, and being permitted to consolidate with other railway companies, can it with any propriety be said that they have not the right to contract with them relative to such matters for their own benefit, when the interests of the public are not injuriously affected and when they only accomplish indirectly and temporarily what they are by statute permitted to accomplish directly and permanently; and so save themselves from the disastrous consequence of reckless competition? Fair competition is a public benefit, but reckless competition invariably results in public injury, and is generally induced and carried on, not with a purpose of benefiting the public, but of destroying or crippling a rival. Common-sense and the experience of mankind teach that railway companies cannot successfully conduct their business and pay operating expenses, unless they receive a certain sum per mile for each ton of freight and each passenger hauled over their road; and that, whenever they are compelled to receive less than that sum they run their trains at a loss, which of course they cannot do for any considerable period without incurring bankruptcy. To say, therefore, that railway companies have no power to protect themselves against loss, by temporary contracts of the character to which this section relates, is to deny to them the right of self-protection and the power to save themselves from financial ruin. The law does not demand or support any such policy, and it is believed that, except when prohibited by statute, contracts for "pooling" earnings by rival lines, *when made in good faith for self-protection, and which do not result in the creation of a monopoly injurious to the public*, are valid and not obnoxious to the charge of being opposed to public policy.

<sup>1</sup> March v. Eastern R. R. Co., 43 N. H. 515; Darling v. B. & W. R. R. Co., 11 Allen (Mass.), 295; Gass v. N. Y., P. & B. R. R. Co., 99 Mass. 220; Root v. Great Western R. R. Co., 45 N. Y. 524; 2 Lans. (N. Y.) 199. An agreement by a railroad to build its road so as to connect with another, and that the charges for transportation shall be regulated by both companies together, has been held to be a valid con-

tract, which will give a ground for injunction restraining such a change of gauge as would break up the connection. Columbus, P. & I. R. R. Co. v. Indianapolis & B. R. R. Co., 5 McLean (U. S. C. C.), 450. A contract to maintain a connection between two railroads is valid. Androscoggin & Ken. R. R. Co. v. Androscoggin R. R. Co., 52 Me. 417; Bartlette v. Nor. & Wor. R. R. Co., 33 Conn. 560.

## CHAPTER XI.

## ACQUISITION OF RIGHT OF WAY BY PURCHASE, ETC.

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| SEC. 208. Power of Railway Companies to acquire Right of Way, etc., by Purchase.<br>209. Conditional Conveyances. | SEC. 210. Bonds for Conveyance : Specific Performance.<br>211. Entry under License. |
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SEC. 208. **Power of Railway Companies to Acquire Right of Way, etc., by Purchase.** — While a railway company may be clothed by its charter or the general law with authority to take lands *in invitum* under the right of eminent domain, yet it may, if it can do so, purchase the fee in the lands necessary for its roadway, etc.,<sup>1</sup> and it may convey the fee to another railroad company to be used for the same purpose.<sup>2</sup> Indeed, it is sometimes made a condition precedent to the right to take lands *in invitum*, that an attempt shall first be made to acquire the same by purchase or agreement with the owners on the proposed line.<sup>3</sup> If the conveyance is unrestricted as to use, there is no reversion in the grantor, but if the conveyance is restricted to the time it is used for railway purposes, the title reverts to the grantor when it ceases to be used for that purpose.<sup>4</sup> Where land is conveyed to a railway company for railway purposes, it is presumed that all the contingent damages which would have been included in an assessment of damages by commissioners were considered in determining the price;<sup>5</sup> and the same duty as to the

<sup>1</sup> Hill v. Western Vt. R. R. Co., 25 Vt. 68; Holt v. Somerville, 127 Mass. 408; Yates v. Van Bogert, 56 N. Y. 526; Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. 121; Page v. Heinberg, 40 Vt. 81; Heath v. Barmore, 50 N. Y. 302; State v. Brown, 27 N. J. L. 13; Wheeling, &c. R. R. Co. v. Gourley, 99 Penn. St. 171; McClure v. Missouri, &c. R. R. Co., 9 Kan. 373.

<sup>2</sup> N. J. Midland R. R. Co. v. Van Syckle, 38 N. J. L. 496; Harrison v. Lexington, &c. R. R. Co., 9 B. Mon. (Ky.) 470; Pollard v. Maddox, 28 Ala. 321; Junction R. R. Co. v. Ruggles, 7

Ohio St. 1; Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y.

<sup>3</sup> Ellis v. Pacific R. R. Co., 51 Mo. 200; Matter of Prospect Park, &c. R. R. Co., 67 N. Y. 371.

<sup>4</sup> State v. Brown, *ante*.

<sup>5</sup> Norris v. Vt. Central R. R. Co., 28 Vt. 99. A grant of the right of way carries with it the right to construct suitable culverts, and the right to construct such culverts includes the power to cut the necessary ditches to carry the water into such culverts, although such ditches may extend beyond the limits of the right of

construction of its road and the building of necessary culverts, embankments, fences, etc., rests upon the company as would have existed if the land had been taken under the right of eminent domain.<sup>1</sup> An indefinite conveyance, or one which merely conveys a right of way over the grantor's land, of a certain width, without describing the same or defining the particular land intended to be conveyed, is void for uncertainty. Thus, a company after making a survey and staking out the same through the plaintiff's land, purchased of him a strip of land six rods wide, and took a deed for the same in which it was described "covered by the location of their railroad *or that may be finally covered by such location.*" The location was afterwards changed, and it was held that the company acquired no rights under the deed in the land covered by the new location.<sup>2</sup> The right of way must be conveyed by the owner of the fee; a mere equitable owner of an undivided interest in a possible reversion,<sup>3</sup> and the holder of a contingent interest can convey no authority to appropriate the land for railroad purposes.

Thus, under a trust deed which vested the legal title to lands in a trustee for the benefit of a married woman and her children, but

way. *Babcock v. Western R. R. Co.*, 9 Met. (Mass.) 553; *Boothbay v. Androscoggin R. R. Co.*, 51 Me. 318; *Read v. N. Y. Central R. R. Co.*, 18 Barb. (N. Y.) 80; *Hortsman v. Lexington, &c. R. R. Co.*, 18 B. Mon. (Ky.) 218; *Conwell v. Springfield, &c. R. R. Co.*, 81 Ill. 232. Where the right of way is granted to a railroad company, and it is necessary to make cuts through the ground to the proper enjoyment of the right of way, it is not incumbent on the grantee to build walls to prevent the falling of the banks. *Hortsman v. Covington & Lexington R. R. Co.*, 18 B. Mon. (Ky.) 218. Where land was granted to a railroad company, and, after the usual covenants, the deed contained this clause, "said corporation to make us a culvert or pass for cattle to pass under said road," it was held that such a grant and provision did not justify the company in digging a ditch in the adjoining land of the grantor to drain the passway. *Hills v. Boston & Maine R. R. Co.*, 18 N. H. 179, 1846. Where a party granted the right of way across his land, by deed, upon condition that the company should fence the road within a reasonable time, which it neglected to do, it was held

that an action on the case will lie to recover damages sustained by the failure to build the fence. *Conger v. Chicago & Rock Island R. R. Co.*, 15 Ill. 366.

<sup>1</sup> *Hortsman v. Covington, &c. R. R. Co.*, 18 B. Mon. (Ky.) 218; *Smith v. N. Y., &c. R. R. Co.*, 63 N. Y. 58.

<sup>2</sup> *Hall v. Pickering*, 40 Me. 548. A conveyance of a right of way will not be held void for uncertainty of description on the ground that it is a deed in fee, when it appears from the instrument that it was only intended as a conveyance of a right of way. *Barlow v. Chicago, Rock Island, & Pacific R. R. Co.*, 29 Ia. 276. Delivery of a deed or contract is essential to its validity. *Stephens v. Buffalo & New York R. R. Co.*, 20 Barb. (N. Y.) 332. In *Barlow v. Chicago, &c. R. R. Co.*, 29 Iowa, 276, a deed of land to a railway company, of such a strip of land as may be selected by the engineer, was held good. But see *Detroit, &c. R. R. Co. v. Forbes*, 30 Mich. 163.

<sup>3</sup> *Tapent v. Detroit, &c. R. R. Co.*, 50 Mich. 267; *Toledo, &c. R. R. Co. v. Dunlap*, 47 Mich. 457; *Tutt v. Port Royal, &c. R. R. Co.*, 16 S. C. 365.

which gave to the husband the absolute control and management of the land, the husband might give to a railway company license to construct its line over such lands, binding so long as he lived, or, at least, until revoked, unless such right of way injuriously affected the duties and limitations imposed upon the husband by the deed.<sup>1</sup> But if any other person has an interest in the land, which is affected by such use of it, their consent must be obtained, or their damages assessed and paid under the statute; as, tenants for years, by dower, curtesy, mortgagees, etc.

**SEC. 209. Conditional Conveyances.** — If the land is conveyed to the company upon a condition, either precedent or subsequent, the title in the company is subject to the performance of such condition. Thus, where a person conveyed a right of way for a railway, upon condition that crossings and cattle-guards should be constructed, it was held that the grantor held an equitable lien upon the land conveyed, not only for the purchase-money, but also for the damages in not constructing the road in the manner provided by the contract, and that the retention of the legal title by him was a fact sufficient to put subsequent grantees and mortgagees upon their guard as to his legal rights. The grantor in such case can either enforce specific performance of the contract or enforce his specific lien.<sup>2</sup>

A conveyance to a railway company of land for the right of way of such road, upon condition that the company should erect and maintain a certain dam or embankment, conveys the title to the land subject to be defeated by the failure of the company to comply with the condition, the condition being a condition subsequent.<sup>3</sup> So, where a release is obtained from the owner of land for the right of way, with a proviso calculated to confine the line of such road to a particular portion of the land, the release will not be operative if the company afterwards constructs its road across the land by a substantially different route.<sup>4</sup> Where a conveyance of a right of way was made on condition that the depot of the company should be located within a certain distance of a given place, it was held that a breach of this condition defeated the title conveyed by the deed, and that the grantor was entitled to have his damages assessed as if no deed had ever been made; and that the estate conveyed being

<sup>1</sup> *Tutt v. Port Royal & Augusta R. R. Co.*, 16 So. Car. 365.

<sup>2</sup> *Dayton, Xenia, & Belpre R. R. Co. v. Lewton*, 20 Ohio St. 401.

<sup>3</sup> *Underhill v. Saratoga & Washington R. R. Co.*, 20 Barb. (N. Y.) 455.

<sup>4</sup> *Douglas v. New York & Erie R. R. Co.*, Clarke's Ch. (N. Y.) 174.

less than a freehold, no formal act of entry on his part was necessary in order to avail himself of the right to proceed in this manner.<sup>1</sup> So a condition in the deed, that certain portions of the land conveyed shall be kept open as public streets, is not void as imposing a duty or trust upon the corporation inconsistent with its business, and outside of the objects for which it was formed.<sup>2</sup>

The title does not vest in the company until all conditions precedent are performed; but where the deed is subject to a condition subsequent, the title may pass and a right of action exist in favor of the grantor against the corporation for damages sustained from its neglect to perform; or, as we shall see, a forfeiture of the title may be claimed. Thus, where the owner of land incumbered by a mortgage sold to a railway company a portion of it to be used for a track, and there was at the time of sale a road over the part conveyed, the right to which had been reserved in the agreement of sale but was omitted in the conveyance,—in an action by one who subsequently purchased the land at a sheriff's sale under the mortgage, against the company and for obstructing this way, it was held that the right of way did not originate in the reservation in the agreement, but existed previous thereto and was merely recognized therein; that the purchaser under the mortgage was entitled to the road, and might maintain an action on the case against the company for obstructing it.<sup>3</sup>

In a Massachusetts case a railroad company, in consideration of an amicable settlement of his damages by the owner of land, agreed with him to fence the land taken; and failing to do so within a reasonable time, was sued by him for breach of the agreement. It was held that a subsequent erection of the fences by the company without the plaintiff's consent or approval did not affect his right to recover; and that the measure of his damages was the sum which it would fairly cost to erect the fences according to the agreement.<sup>4</sup> But, as previously stated, the land-owner cannot eject the corporation for a breach of a condition subsequent. Thus, where a land-owner, by a written contract, agreed to give to a railroad company the perpetual right of way through the same, at a stipulated price which was paid to him, with a provision in the contract that when

<sup>1</sup> *Taylor v. Cedar Rapids & St. Paul R. R. Co.*, 25 Ia. 371. Penn. St. 417; *Nicoll v. N. Y. & Erie R. R. Co.*, 12 N. Y. 121.

<sup>2</sup> *Tinkham v. Erie R. R. Co.*, 53 Barb. (N. Y.) 393.

<sup>4</sup> *Lawton v. Fitchburg R. R. Co.*, 8 Cush. (Mass.) 230.

<sup>3</sup> *Pennsylvania R. R. Co. v. Jones*, 50



the road should be completed the company should fence the same, it was held that after the road is completed, the owner of the land cannot, upon failure to put up the fence, eject the company from the land.<sup>1</sup> And even where a condition precedent to the vesting of the title is not performed, if the grantor neglects to avail himself of the breach seasonably, and permits the company to go on making large expenditures without protest or objection, he may be estopped from setting up such breach. Thus, the defendant obtained from the plaintiff a deed in fee of a strip of land for the extension of its railroad, and covenanted to make and maintain the fences, etc.; and the deed was to be void, unless the railroad was completed through the premises granted on or before a certain day therein named. The road was not completed at the time specified, but the plaintiff made no effort to assert his right to the estate. During a period of two years, he saw the defendant make large expenditures over the premises in question; plaintiff gave notice to make the fences, which was done about a year before the suit commenced. It was held that the plaintiff had waived the forfeiture, and could not recover the premises, in an action of ejectment.<sup>2</sup>

The question as to whether a condition is precedent or subsequent depends upon the intention of the parties, to be gathered from the conveyance and the nature of the transaction,<sup>3</sup> and no precise or formal words are necessary to create it, nor is it material in what part of the instrument it is placed.<sup>4</sup> If the act is to be done *before* the title vests, it is a condition precedent; but if it may as well be performed *after* as before the vesting of the title, or if from the nature of the act to be performed, and the time for its performance, it is evidently the intention of the parties that the title shall vest, and the condition be afterwards performed, it is a condition subsequent.<sup>5</sup> This class of conditions is not favored in law and will always be strictly construed. The breach of such a condition works a forfeiture at the election of the grantor or his heirs, which must be signified by some decisive act which is equivalent to a re-entry at common law;<sup>6</sup> and equity will not lend its aid to enforce a forfeiture under a condition subsequent, but where there is no adequate remedy at law, will sometimes cancel the deed as a cloud upon the grantor's

<sup>1</sup> Hornback v. Cincinnati & Zanesville R. R. Co., 20 Ohio St. 81.

<sup>2</sup> Ludlow v. New York & Harlem R. R. Co., 12 Barb. (N. Y.) 440.

<sup>3</sup> Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. 121.

<sup>4</sup> Ashurst, J., in Hotham v. East India Co., 1 T. R. 645.

<sup>5</sup> Underhill v. Saratoga, &c. R. R. Co., 20 Barb. (N. Y.) 455; Parmelee v. Oswego &c. R. R. Co., 6 N. Y. 74.

<sup>6</sup> Hall v. Pickering, 40 Me. 548.

title.<sup>1</sup> The breach of such a condition is only available to the grantor or his heirs,<sup>2</sup> but not even to an heir, if he claims by deed.<sup>3</sup>

**SEC. 210. Bonds for Conveyance: Specific Performance.** — A railway company which has not yet procured its charter or filed its articles of association cannot take a conveyance of land for its roadway. Such an act would be *ultra vires*;<sup>4</sup> but conveyances may be taken by individuals for such purpose in trust for the company when formed. But after it is formed, it may take conveyances for such purpose, or it may obtain the right to such lands by bonds or contracts from the owners to convey, and, upon fulfilling the conditions thereof on its part, specific performance of such contracts will be enforced in equity.<sup>5</sup> But proof of a written contract to sell land to a railway company at a certain price, within a certain time, and a tender of the amount within that time, and a refusal to accept it, will not authorize the company to enter upon the land afterwards, and locate its road upon it, or defeat a petition for damages sustained by reason of such location.<sup>6</sup>

It is no defence to a bill for specific performance of a contract to convey lands to a railway company under a bond or contract for a deed, that the company has not completed its road within the time limited in its charter;<sup>7</sup> that is a matter which lies between the company and the State, which cannot be made available by strangers. But a specific performance will not be decreed where it would be inequitable, but the party will be left to his remedy at law.<sup>8</sup> Indeed, the same rules prevail in respect to these contracts, as prevail in similar contracts between individuals, and the contract must be complete,<sup>9</sup> certain,<sup>10</sup> mutual,<sup>11</sup> fair and just,<sup>12</sup> and the remedy

<sup>1</sup> Vicksburgh &c. R. R. Co. v. Ragsdale, 54 Miss. 200; Memphis, &c. R. R. Co. v. Neighbors, 51 id. 412.

<sup>2</sup> Paul v. Connersville, &c. R. R. Co., 51 Ind. 527; Underhill v. Saratoga, &c. R. R. Co., 20 Barb. (N. Y.) 455.

<sup>3</sup> Rice v. Boston, &c. R. R. Co., 12 Allen (Mass.), 141.

<sup>4</sup> Gage v. New Market, &c. Ry. Co., 18 Q. B. 457.

<sup>5</sup> Boston, &c. R. R. Co. v. Babcock, 3 Cush. (Mass.) 228; Chicago, &c. R. R. Co. v. Swinney, 38 Iowa, 132.

<sup>6</sup> Whitman v. Boston & Maine R. R. Co., 3 Allen (Mass.), 133.

<sup>7</sup> Ross v. Chicago, &c. R. R. Co., 77 Ill. 127.

<sup>8</sup> Coe v. N. J. Midland R. R. Co., 31

N. J. Eq. 105; Gooday v. Culchester, &c. R. R. Co., 17 Beav. 132; Whitney v. New Haven, 23 Conn. 624.

<sup>9</sup> Johnson v. Johnson, 16 Minn. 517; Barnet v. Dougherty, 32 Penn. St. 372; Losee v. Morey, 57 Barb. (N. Y.) 561; Walker v. Eastern Counties Ry. Co. 6 Hare, 57; Purrinton v. Illinois, &c. R. R. Co., 46 Ill. 297.

<sup>10</sup> Stuart v. London, &c. Ry. Co., 1 De G. M. & G. 721; South Wales Ry. Co. v. Wythes, 5 id. 88; Wilson v. Northampton Ry. Co., L. R. 9 Ch. 279; Hood v. North Eastern Ry. Co., L. R. 5 Ch. 525; Holmes v. Eastern Counties Ry. Co., 3 K. & J. 675.

<sup>11</sup> Rogers v. Saunders, 16 Me. 92.

<sup>12</sup> Webb v. Direct London & Portsmouth

must not be harsh or oppressive.<sup>1</sup> So too, the contract must be free from doubt,<sup>2</sup> misrepresentation or fraud,<sup>3</sup> mistake,<sup>4</sup> or illegality.<sup>5</sup>

The fact that a land-owner has a remedy in damages will not prevent a court of equity, in a proper case, from compelling a railway company to perform its agreement to make erections for the land-owner's benefit.<sup>6</sup>

In many instances equity will interfere to restrain breaches of this class of contracts, where it will not decree a specific performance.<sup>7</sup> It will not decree a specific performance of contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in such oversight; such as agreements to repair or to build, to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings, are not, as a general rule, specifically enforced.<sup>8</sup>

Ry. Co., 9 Hare, 129; Marble Co. v. Ripley, 10 Wall. (U. S.) 330.

<sup>1</sup> Clarke v. Rochester, &c. R. R. Co., 18 Barb. (N. Y.) 350; Edwards v. Grand Junction Ry. Co., 1 My. & C. 674; Hawkes v. Eastern Counties Ry. Co., 1 De G. M. & G. 737.

<sup>2</sup> Pyrke v. Waddingham, 10 Hare, 1; Walsh v. Hall, 66 N. C. 233; Kortenhader v. Spotts, 80 Penn. St. 430; Owings v. Baldwin, 8 Gill (Md.), 337; Allen v. Atkinson, 21 Mich. 351; Taylor v. Williams, 45 Mo. 80; Jeffries v. Jeffries, 117 Mass. 184; Dobbs v. Norcross, 24 N. J. Eq. 327.

<sup>3</sup> Holmes' Appeal, 77 Penn. St. 50; Gunby v. Slater, 64 Md. 237; Law v. Grant, 37 Wis. 548; Hickey v. Drake, 47 Mo. 369.

<sup>4</sup> Bradbury v. White, 4 Me. 391; Peterson v. Grover, 20 Me. 363; Wycombe Ry. Co. v. Donnington Hospital, L. R. 1 Ch. 268.

<sup>5</sup> Flanagan v. Gt. Western Ry. Co., L. R. 7 Eq. 116.

<sup>6</sup> Hawkes v. Eastern Counties Ry. Co. 5 H. L. Cas. 331; Stuart v. London, &c. Ry. Co., 15 Beav. 513; Tillett v. Charing Cross Bridge, 26 Beav. 419; Boston & Maine R. R. Co. v. Babcock, 3 Cush. (Mass.) 228; Lexington, &c. R. R. Co. v.

Ormsby, 7 Dana (Ky.), 276; Blanchard v. Detroit, &c. R. R. Co., 31 Mich. 43.

<sup>7</sup> Coe v. Louisville, &c. R. R. Co., 3 Fed. Rep. 775; Western Union Tel. Co. v. Union Pacific R. R. Co., 3 Fed. Rep. 721. It will never decree a specific performance where the remedy cannot take effect at once, but requires a prolonged control of personal acts involving skill and discretion. Port Clinton R. R. Co. v. Cleveland, &c. R. R. Co., 13 Ohio St. 544; Blanchard v. Detroit, &c. R. R. Co., 31 Mich. 43; Blackett v. Bates, L. R. 2 Ch. 117; Shrewsbury, &c. R. R. Co. v. Stour Valley R. R. Co., 2 De G. M. & G. 866.

<sup>8</sup> Errington v. Aynesly, 2 Bro. C. C. 343; Lucas v. Commerford, 3 Bro. C. C. 166; Mosely v. Virgin, 3 Ves. 184; Flint v. Brandon, 8 Ves. 159; Paxton v. Newton, 2 Sm. & Gif. 437; South Wales Ry. Co. v. Wythes, 5 De G. M. & G. 880; Booth v. Pollard, 4 Y. & C. Ex. 61; Pollard v. Clayton, 1 K. & J. 462; Garrett v. Banstead, &c. Ry. Ro., 4 De G. J. & S. 462; Munro v. Wivenhoe, &c. Ry. Ro., 4 De G. J. & S. 729, per KNIGHT BRUCE, L. J.; Gervais v. Edwards, 2 Dr. & W. 80; Counter v. Macpherson, 5 Moo. P. C. 83; Ford v. Stuart, 15 Beav. 493; Peto v. Brighton, &c. Ry. Co., 1 H. & M. 468; Heathcote v. North Staffordshire Ry. Co.,

SEC. 211. **Entry under License.** — A railway company may enter upon lands and construct its roadway under a parol license from the owner, and is protected by such license from all the necessary consequences of the construction and operation of its road, as much as it would be under a deed, or proceedings under the statute; but such license is revocable at the will of the land-owner, and from that moment the right to maintain the road there ceases.<sup>1</sup>

20 L. J. (N. S.) 82; *Hamilton v. Dunsford*, 6 Ir. Ch. Rep. 412; *Morrison v. Barrow*, 1 De G. F. & J. 633; *Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co.*, L. R. 9 Ch. 331; *Blackett v. Bates*, L. R. 1 Ch. 117, reversing 2 H. & M. 270; *Fothergill v. Rowland*, L. R. 17 Eq. 132; *DeMattos v. Gibson*, 4 De G. & J. 276, 297, per Ld. CHELMSFORD; *Mann v. Stephens*, 15 Sim. 379; *Bernard v. Meara*, 12 Ir. Ch. 389; *Armstrong v. Courteney*, 15 Ir. Ch. 138; *Merchants' Trading Co. v. Banner*, L. R. 12 Eq. 18; *Wheatley v. Westminster Brymbo Coal Co.*, L. R. 9 Eq. 538; *Marble Co. v. Ripley*, 10 Wall. (U. S.) 340; *Port Clinton R. R. v. Cleveland & Toledo R. R.*, 13 Ohio St. 544; *Fallon v. R. R. Co.*, 1 Dill. (U. S.) 121; *Ross v. Union Pacific R. R.*, 1 Woolw. (U. S. C. C.) 26; *Green v. Smith*, 1 Atk. 573; *Waring v. Manchester, &c. Ry. Co.*, 7 Hare, 492. As examples, — contracts for erecting or repairing buildings, *Beck v. Allison*, 56 N. Y. 367; *Mastin v. Halley*, 61 Mo. 196; a contract to cultivate, cut, cure, and deliver a certain crop in a prescribed manner, *Starnes v. Newson*, 1 Tenn. Ch. 239; a contract to construct a spout in a water-course, *Randall v. Latham*, 36 Conn. 48. But in *Columbia Water, &c. Co. v. Columbia*, 5 S. C. 235, a contract between the company and the city by which the former were to construct certain extensive water-works for the city, was specifically enforced against the city by compelling it to accept them, etc., after the works had been constructed by the plaintiff. The doctrine of the text was also applied in the cases of a contract to transport all of the plaintiff's freight, *Atlanta, &c. R. R. v. Speer*, 32 Ga. 550; an agreement to construct a fence, *Cincinnati, &c. R. R. v. Washburn*, 25 Ind. 259; an agreement to keep cattle-guards in re-

pair, *Columbus, &c. R. R. v. Watson*, 26 Ind. 50.

<sup>1</sup> *Murdock v. Prospect Park, &c. R. R. Co.*, 73 N. Y. 579. In *Miller v. The Auburn & Syracuse R. R. Co.*, 6 Hill (N. Y.), 61, the defendants erected their railroad with an embankment upon Garden street in Auburn, interrupting the plaintiff's access to his premises, in 1839, and maintained it until 1842, when this suit was brought. The defendants offered to prove that the embankment was raised under a parol license from the plaintiff, but the proof was excluded by the court, and the case was heard in the Supreme Court upon the question of the admissibility of that evidence. COWEN, J., among other things, said: "If what the defendants in this case proposed to show was true, namely, that the plaintiff verbally authorized the making of the railway, while the authority remained their acts were not wrongful. License is defined to be a power or authority. So long as the license was not countermanded, the defendants were acting in the plaintiff's own right." In *Hetfield v. Central R. R. Co.*, 29 N. J. L. 571, the defendant entered upon the plaintiff's land, and built its road under his verbal consent, but took no conveyance from him. The court held that it was not a consent that was intended to convey a title, and was revocable. *Ex parte Coburn*, 1 Cow. (N. Y.) 570; *Cook v. Stearns*, 11 Mass. 533; *Ruggles v. Leasure*, 24 Pick. (Mass.) 190; *Prince v. Case*, 10 Conn. 375; *Rex v. Horndon-on-the-hill*, 4 M. & S. 565; *Fentiman v. Smith*, 4 East, 107; *Hewlins v. Shippam*, 5 B. & C. 222; *Bryan v. Whistler*, 8 id. 288; *Cocker v. Cowper*, 1 C. M. & R. 418; *Wallis v. Harrison*, 4 M. & W. 538. It has been held in some of the cases that the effect of a license ex-

But until revoked it is a complete protection against the necessary consequences of the act.<sup>1</sup> In those cases where assent has been given to one by another to do a certain act upon his land, the natural and probable consequences of which are to produce a certain result, and the person to whom assent is given goes on and expends money on the strength of the assent, and makes erections of a permanent character, — while the assent does not give any interest in the land, and *at law* is revocable at any time, even though given for a consideration,<sup>2</sup> yet a court of equity, in a proper case, will enforce it as an agreement to give the right, and particularly where its revocation would operate as a fraud upon the licensee, or would be productive of great hardship, will restrain its revocation.<sup>3</sup> But even at law, a license is a full defence for all acts done under it, *within the scope of the license*, before its revocation, but not after.<sup>4</sup> But the

executed, as for instance to enter upon land to erect a house or dam, and followed by user, is to give the licensee a right to personal property upon the land of the grantor, and although revocable at will, yet the licensee can enter for its removal, although not to maintain or use the property there; that the license is irrevocable as to the right to remove the property. *Barnes v. Barnes*, 6 Vt. 388; *Prince v. Case, ante*; *Van Ness v. Pacard*, 2 Pet. (U. S.) 143; *Curry v. Ins. Co.*, 10 Pick. (Mass.) 540; *Marcey v. Darling*, 8 id. 283. There is a class of cases, however, particularly in Pennsylvania, where it is held that where acts have been done in pursuance of a license and relying upon it, the license operates as an equitable estoppel, and the licensor will be estopped from revoking it to the injury of the licensee, so long as the license is not exceeded; but that for all excess of use an action may be maintained. *Bridge Co. v. Bragg*, 11 N. H. 102; *Lefevre v. Lefevre*, 4 S. & R. (Penn.) 241; *Ricker v. Kelly*, 1 Greenl. (Me.) 117; *Hepburn v. McDowell*, 17 S. & R. (Penn.) 383; *Cook v. Prigden*, 45 Ga. 331, 12 Am. Rep. 582; *Houston v. Laffee*, 46 N. H. 505. In *Selden v. Delaware & Hudson Canal Co.*, 29 N. Y. 634, where the defendants entered upon the lands of plaintiff by parol license from him, and enlarged the same, it was held that the license operated as a defence to all that had been done under it, but would not

justify a maintenance of the same after the license is revoked. The same was also held in *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; *Foot v. N. H. & Northampton Co.*, 23 Conn. 214; *Eggleston v. N. Y. & H. R. R. Co.*, 35 Barb. (N. Y. Sup. Ct.) 162. In *Woodard v. Seeley*, 11 Ill. 157, it was held that a license by deed or parol is always revocable, unless coupled with an interest and executed, and that *then* it is irrevocable. In *Kimball v. Yates*, 14 Ill. 464, it was held that a parol license to cross a man's farm is revocable at any time at the will of the licensor.

<sup>1</sup> *Louisville, &c. R. R. Co. v. Thompson*, 18 B. Mon. (Ky.) 785; *Foot v. New Haven & N. H. R. R. Co.*, 23 Conn. 214.

<sup>2</sup> *Huff v. McCauley*, 53 Penn. St. 206; *Houston v. Laffee*, 46 N. H. 505; *Hetfield v. Central R. R. Co.*, 29 N. J. L. 571.

<sup>3</sup> *Veghte v. The Raritan, &c. Co.*, 19 N. J. Eq. 142; *Brown v. Bowen*, 30 N. Y. 543; *Wood on Nuisances*, 347.

<sup>4</sup> *Wolfe v. Frost*, 4 Sandf. (N. Y.) Ch. 72; *Railroad Co. v. McLaughlin*, 59 Penn. St. 23; *Cook v. Prigden*, 45 Ga. 331; *Houston v. Laffee*, 46 N. H. 508; *Bridges v. Purcell*, 1 Dev. & B. (N. C.) 462; *Mumford v. Whitney*, 15 Wend. (N. Y.) 379. As to the effect of a license from one to do an act upon the land of another, at law, the case of *Hetfield v. Central R. R. Co.*, 29 N. J. L. 571, is in point. In that case, the charter of the defendant authorized them to enter upon and take

license must not be exceeded, and in order to operate as a defence at law for an act done in pursuance of it, it must be shown that it covers the very act for the recovery of damages for the doing of which action is brought; and if the license does not embrace the act to the full extent, liability will attach for all such excess. Thus, if an action is brought for an injury resulting from the flooding of land by a dam erected by the defendant, it is not enough to show that the plaintiff assented to or licensed the erection of the dam, *unless it appears that he could then have known or reasonably foreseen that his land would be injured by the dam in the manner complained of.*<sup>1</sup> If the dam itself is so erected as to produce damage to the lands of supra-riparian owners, it is a nuisance, and parties injured thereby are not estopped from a recovery for injuries therefor upon the ground of acquiescence in its construction, *unless it could reason-*

the lands required for their road, but directed that they should not enter without the consent of the owner. The defendant entered upon the plaintiff's lands by his consent, but did not take any conveyance from him in the manner required by law, in order to give them right or title. The court held that this consent did not dispense with the necessity of a deed or conveyance of the land or right, in the form required by law. A license to build a railway upon the licensor's land is a complete and full justification of any act necessary and properly done in the prosecution of the work while the license is in force; but it may at any time be revoked, and from the time of such revocation ceases to be a protection. *Blaisdell v. Portsmouth, &c. R. R. Co.*, 51 N. H. 483. So far as the license has been executed, it affords a good defence against an action for acts done under it, but it is revocable at the will of the land-owner, and after its revocation, the licensee is a trespasser. *New Orleans, &c. R. R. Co. v. Moye*, 39 Miss. 374. And it cannot be pleaded as a defence in an action of ejectment to recover the land. *Eggleston v. N. Y. & Harlem R. R. Co.*, 35 Barb. (N. Y.) 162. If conditions are attached to the manner in which the license shall be executed, they must be complied with. Thus, a railroad company claimed the right to construct its road without first making compensation or giving security

to the land-owner, alleging that he had given license to do so, "provided the road would go on the west side of his house, against the hillside, and high enough to save his water-power." It was held that the height of the grade was a condition of the right to enter and construct. The fact that the company had located its route as designated was not a waiver of the right of compensation, paid or secured before entry, unless the condition as to grade was complied with. The company forfeits its license when it violates the condition on which it was given, and will be restrained until it does equity. The company, relying on a waiver, must come into court with full, distinct, and unequivocal proof of such waiver. *Unangst's Appeal*, 55 Penn. St. 128.

<sup>1</sup> *Bell v. Elliott*, 5 Blackf. (Ind.) 113.

In any event, if a license is given under a misapprehension of the effects of its exercise, it may at once be revoked. *Brown v. Bowen*, 30 N. Y. 519; *Smith v. Scott*, 1 Kerr (N. B.), 1; *Allen v. Fiske*, 42 Vt. 462; *Eaton v. Winne*, 20 Mich. 156; *Hamilton v. Wudolf*, 36 Md. 301; *Dempsey v. Kipp*, 62 Barb. (N. Y.) 311; *Eustis v. Chiner*, 56 Me. 407; *Freeman v. Hadley*, 33 N. J. L. 523; *Giles v. Simonds*, 15 Gray (Mass.), 401; *Moye v. Tappan*, 23 Cal. 306; *Drake v. Wells*, 11 Allen (Mass.), 141; *Miller v. State*, 39 Ind. 267; *Druse v. Wheeler*, 22 Mich. 439; *Dodge v. McClintock*, 47 N. H. 383.

ably have been ascertained or foreseen at the time of its erection that it would produce the ill results complained of. In this respect it stands precisely upon the same ground as any other nuisance, and the rule in reference to acquiescence therein, and estoppel by reason of acquiescence, is that where a person acquiesces in the erection or maintenance of anything that is a nuisance *per se*, or that he might reasonably have foreseen would become a nuisance, a court of equity will not interfere by injunction to relieve him from the effects thereof; but his remedy at law remains, unless he has bound himself by grant or license sufficient in law to bar an action, or unless the party maintaining the nuisance has acquired a prescriptive right to maintain it. *The law presumes that when a man assents to the doing of an act, he only assents to its being so done as not to injure him.*<sup>1</sup> But while a license must not be exceeded, yet it carries with it all the incidents necessary to its exercise. Thus, a license to take stone from the licensor's land carries with it the right to enter with teams to draw them away, the right to be exercised carefully;<sup>2</sup> and a license to take wood from certain premises carries with it the right to enter to cut and draw it away,<sup>3</sup> and a license to cultivate land carries with it as an incident the right to enter and remove the crops.<sup>4</sup>

<sup>1</sup> Bankhardt v. Houghton, 27 Beav. 425, is a very full and acceptable authority upon this point, and, except that the case is a very long one, it would be given here. See also McKnight v. Rateliff, 44 Penn. St. 159<sup>6</sup>, where it was held that, though the plaintiffs, who were in the mining business, permitted the defendants, in the same business, to operate through their gangway, yet that this permission would not justify the defendants in filling up the plaintiff's shaft with water.

<sup>2</sup> Clark v. Vermont Central R. R. Co., 28 Vt. 103. A licensee of land is liable to the licensor for all damages arising from such a use of the premises — *e. g.*, the yarding of sheep affected with "the scab" — as makes the soil communicate an infectious disease to the property of the licensor, the latter being ignorant of the danger thereof. Eaton v. Winne, 20 Mich. 156. It is well settled that the mere permission to pass over lands which are dangerous, either naturally or by reason of the use which is made of them, imposes no duty or obligation upon the owner of such lands, except to refrain

from acts which are wilfully injurious or knowingly in the nature of a trap, and except, also, where there are hidden dangers, the concealment of which would be in the nature of a fraud. He who enjoys the permission or passive license is only relieved from the responsibility of being a trespasser, and must assume all the ordinary risk attached to the nature of the place, or the business carried on there. Vanderbeck v. Hendry, 34 N. J. L. 467. A railroad left a large lot, traversed by sidings, open for the convenient access of the public in loading and unloading lumber. It also suffered the public to use its track to pass and repass from one side of the city to another. It was held that the license created the duty on the part of the company to use their track so as not to endanger personal safety. Kay v. Pennsylvania R. R. Co., 65 Penn. St. 269.

<sup>3</sup> Clark v. Vermont, &c. R. R. Co., 28 Vt. 103; Driscoll v. Marshall, 15 Gray (Mass.) 62.

<sup>4</sup> Com. v. Rigney, 4 Allen (Mass.), 416; Cornish v. Stubbs, 39 L. J. C. P. 206.

In some of the States it is held that a license which is executed cannot be revoked, at least without first reimbursing the licensee for all expenditures made in pursuance of such license;<sup>1</sup> and in others, if it is founded upon a consideration;<sup>2</sup> and in others, if it is coupled with an interest in *personal* property.<sup>3</sup> But the rule established by the better class of cases may be said to be, that a *parol license to do an act upon the land of another which amounts to an easement therein*, is void under the statute of frauds, and while affording a justification for acts done in pursuance thereof before it is revoked, may, at law, be revoked at the will of the licensor, without reimbursing the licensee for any expenditures made in executing it;<sup>4</sup> and that the licensee, *after* the license is revoked, is liable to the licensor for all damages which result from a continuance of the thing licensed.<sup>5</sup>

When the company entered and laid its track under a license, upon its revocation it has a right to enter and remove it,<sup>6</sup> but not if it entered without authority.<sup>7</sup>

<sup>1</sup> Woodbury v. Parshley, 7 N. H. 237.

<sup>2</sup> Wilson v. Vilas, 19 Ind. 10; Wilson v. Chalfant, *ante*.

<sup>3</sup> Long v. Buchanan, 27 Md. 502; Claffin v. Carpenter, 4 Met. (Mass.) 580; Nelson v. Nelson, 6 Gray (Mass.), 385.

<sup>4</sup> Cook v. Stearns, 11 Mass. 533; Morse v. Copeland, 2 Gray (Mass.), 302; Stevens v. Stevens, 11 Met. (Mass.) 251.

<sup>5</sup> Foot v. N. H., &c. R. R. Co., *ante*. In this case the defendant was held liable for injuries resulting from the diversion of water upon his lands by means of a cul-

vert erected by the defendant under a license from the plaintiff's grantor, as the license was revoked by the conveyance and ceased to be operative from that time. See also Cobb v. Fisher, 121 Mass. 169, where the same rule was adopted under a similar state of facts.

<sup>6</sup> Justice v. Nesquehoning Valley R. R. Co., 87 Penn. St. 82; Northern Central R. R. Co. v. Canton County, 30 Md. 347; Dietrich v. Murdock, 42 Mo. 279.

<sup>7</sup> Merriam v. Brown, 128 Mass. 391.



## CHAPTER XII.

## WHAT ACTS ARE LEGALIZED BY LEGISLATIVE GRANT.

SEC. 212. What acts are excused by Legislative grants.

213. Obligations resting upon Public Companies in the Discharge of their powers.

214. Authority to erect Bridges over navigable Streams.

215. Exemption from Indictment for public Nuisance.

216. Liable to Indictment in certain Cases.

217. Power of the Legislature.

SEC. 218. Legislative Grants do not exempt company from Liability for private Damages in certain Cases.

219. Implied Condition that the Franchise shall be properly Exercised.

220. What is a taking of property.

221. Power of Parliament, in England, omnipotent.

222. No Remedy can be had for Injuries purely Consequential, etc.

SEC. 212. **What Acts are excused by Legislative Grants.**—The question as to how far legislative authority to do an act which otherwise would be a nuisance operates to shield those to whom the authority is given from liability for damages sustained by others therefrom, is one of great importance, and one which has often engaged the attention of courts, and which is now far from being definitely settled. It may, however, be stated, that a person or corporation authorized by law to do a particular thing, as to build a railroad,<sup>1</sup> a turnpike,<sup>2</sup> a bridge across a navigable stream,<sup>3</sup> or to carry on a particular class of business, as for the manufacture of gas to supply the people of a town or city therewith,<sup>4</sup> so long as they keep within the scope of the power granted, are completely protected from indictment and punishment for a public nuisance, and from proceedings either at law or in equity in behalf of the public therefor.<sup>5</sup> But this is subject to this qualification, that the nuisance

<sup>1</sup> *Rex v. Pease*, 4 B. & Ad. 30; *Rex v. Morris*, 1 id. 441.

<sup>2</sup> *State v. Williamstown Turnpike Co.*, 24 N. J. L. 547; *State v. Clarksville R. & T. Co.*, 2 Sneed (Tenn.), 88; *Com. v. Hancock Free Bridge*, 2 Gray (Mass.), 58; *State v. Scott*, 2 Swan (Tenn.), 332; *Beckett v. Upton*, 33 Eng. L. & Eq. 108.

<sup>3</sup> *Jolly v. Terre Haute Drawbridge Co.*, 6 McLean (U. S.), 237; *Attorney-General*

*v. Hudson River R. R. Co.*, 9 N. J. Eq. 526; *State v. Parrott*, 71 N. C. 311.

<sup>4</sup> *People v. Gas-light Co.*, 64 Barb. (N. Y.) 55; *Imperial Gas Co. v. Broadbent*, 7 H. L. 605; *Carhart v. Auburn Gas-light Co.*, 22 Barb. (N. Y.) 297.

<sup>5</sup> *People v. Law*, 34 Barb. (N. Y.) 494; *People v. N. Y. Gas-light Co.*, 64 id. 55; *Carhart v. Auburn Gas-light Co.*, 22 id. 297; *People v. Platt*, 17 Johns.

arises as a natural and probable result of the act authorized, so that it may fairly be said to be covered in legal contemplation by the legislature conferring the power.<sup>1</sup> If the nuisance is not the necessary result of the act or work authorized, or if it might be exercised in such a way as to obviate the nuisance, legislative authority will not be inferred from the grant to create the nuisance, and will not operate as a protection or excuse therefor either against an indictment or a suit in behalf of the public, at law or in equity, to abate the nuisance.<sup>2</sup> Hence it is only when the nuisance is a *necessary*

(N. Y.) 195; *Davis v. Mayor*, 14 N. Y. 506; *Com. v. Reed*, 34 Penn. St. 275; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Rex v. Pease*, 4 B. & Ad. 30.

<sup>1</sup> In *Regina v. Bradford Navigation Co.*, 6 B. & S. 631, the defendants were authorized to construct and maintain a canal, which they proceeded to do in 1774. In 1802 they erected a dam across a stream called Bradford Beck, and made a reservoir of stone at the head of the canal, into which the water was turned and held in reserve to supply the canal when the water therein was low. The water thus turned into the canal was impregnated with sewage, and, by standing in the canal, emitted noxious and unwholesome odors, to the nuisance of those living in the vicinity of the canal. This action was brought to restrain the company from turning into this canal any further sewage or other matter calculated to create a nuisance. The defendants admitted that the nuisance existed, but insisted that, as they had the right to use the water of Bradford Beck for the purposes of their canal, and that, as they did not pollute the water of the stream or impregnate it with sewage, they could not be made answerable for the nuisance resulting from its use. It appeared that when the canal was built, and down to within three or four years before the commencement of the action, the water of Bradford Beck had been pure, and that the impurity arose from leading into the beck the sewage from the town of Bradford, which, within a few years, had largely increased in population, so that, although the water was impure, no deposit of an offensive kind took place. The water in the canal was stagnant, and there was no current or flow

of water, and the sewage was deposited in the canal, so that when boats passed through it it emitted very offensive smells and gases. The court held, that although the company was authorized by Parliament to construct the canal, and feed it with the water from Bradford Beck, yet, as at that time the water was clear and pure, it could not be held as having been contemplated by Parliament that the water would become so impure as to make its use in the canal a public nuisance; and the use of the water was enjoined, as well as a use of the canal in any way so as to create a public nuisance by reason of noxious smells emitted from the water used therein.

<sup>2</sup> *Attorney-General v. Metropolitan Board of Work*, 1 H. & M. 320; *Clark v. R. R. Co.*, 36 Mo. 202, in which it was held that an action would not lie for damages arising from the overflow of land occasioned by the proper construction of their road-bed. But this applies only to injuries sustained by one whose land is taken and whose damages have been assessed. *Attorney-General v. Birmingham*, 4 K. & J. 528; *Imperial Gas Co. v. Broadbent*, 7 H. L. Cas. 605; *Stainton v. Woolrych*, 23 Beav. 225; *Hutton v. R. R. Co.*, 7 Ha. 259; *R. R. Co. v. Artcher*, 6 Paige (N. Y.), 83; *Sandford v. R. R. Co.*, 24 Penn. St. 378. While companies acting under legislative power are the best judges of the manner in which their works are to be constructed, yet, if they are proceeding to execute them in such a manner as to do unnecessary damage, or inflict unnecessary injury, they are liable therefor. *London, &c., R. R. Co. v. Canal Co.*, 1 Ra. Cas. 225; *Coates v. Clarence R. R. Co.*, 1 R. & M. 181; *East & West India Docks R. R. Co. v. Gattke*, 2 Ra. Cas. 380.

and *probable* result of the act done in pursuance of legislative authority that the grant operates as a protection against indictment or suit therefor. Otherwise it cannot be said to have been contemplated by the grant, and therefore is not authorized by it.<sup>1</sup>

SEC. 213. **Obligations resting upon Public Companies in the Discharge of their Powers.**—So, too, where a person or corporation is, vested with authority by the legislature to do an act which, unless carefully and skilfully done, will operate injuriously to the public or to individuals, they are bound to execute the power in *good faith*, and to exercise the highest degree of care to prevent injurious results; and it is only against those acts which, in the exercise of such care and skill, operate injuriously, that their grant operates as an excuse or defence. If negligence can in any measure be predicated of their acts, they are liable for all the consequences, civilly and criminally, resulting therefrom. The rule is, that where a corporation or an individual is authorized to do an act, which is in derogation of private rights, they are bound to exercise the power given, with moderation and discretion, and not negligently.<sup>2</sup> Thus, where a railroad company were authorized to make excavations for their road-bed, it was held that they were bound to make them with reasonable regard to the rights of adjoining owners; and when they were proceeding with the work without taking sufficient precaution to secure the safety of an adjoining house, they were restrained from proceeding until such precautions were properly provided for, and

<sup>1</sup> *Regina v. Bradford Navigation Co.*, 6 B. & S. 631; *People v. Gas-light Co.*, 64 Barb. (N. Y.) 55. In *Clark v. Mayor of Syracuse*, 13 Barb. (N. Y.) 32, the legislature declared a stream navigable, and afterward authorized the plaintiff to erect a dam upon it. It was held by the court that this authority only protected the plaintiff from the consequences of the nuisance to navigation, and was no protection for nuisances occasioned by the dam in other respects. In *Richardson v. Vt. Central R. R. Co.*, 25 Vt. 465, it was held that where the defendant, in the erection of its railroad, made an excavation upon its own land so near to the plaintiff's land adjoining that his land slid into the excavation, the defendants were liable for the injury. In this case no part of the plaintiff's premises were taken by the defendants for the purposes of their road,

and the liability of the defendants, for injuries resulting to the plaintiff, was placed upon the same ground as though they had been occasioned by an individual owning the adjoining tract. BENNETT, J., in a very able opinion, which occupies the position of a leading opinion upon questions of this character, said: "There is no pretence that the railroad company, in digging the excavation on their own land, were in the wrong; neither, in so doing, did they remove any of the plaintiff's soil directly, *but the slide was a consequence of it.* . . . They cannot justify the removal of the plaintiff's soil from any powers attempted to be conferred upon them, either by their charter or the general railroad law."

<sup>2</sup> *Biscoe v. Great Eastern Ry. Co.*, L. R. 16 Eq. Cas. 640.

an inquiry as to damages was granted.<sup>1</sup> When the company can exercise its rights in a way that will not be productive of injury to private rights, it is bound so to exercise it, and a court of equity will always interfere to prevent their exercise in a vexatious or careless way.<sup>2</sup> If there are two modes in which the work can be done, one of which would create a nuisance, and the other not, they are bound to choose the method which will obviate the nuisance.<sup>3</sup>

<sup>1</sup> *Rickett v. Metropolitan Ry.*, L. R. 2 H. L. 175.

<sup>2</sup> *London, &c. R. R. Co. v. Canal Co.*, 1 Ra. Cas. 225.

<sup>3</sup> In *Matthews v. West London Water Works Co.*, 3 Camp. 402, the defendants were authorized to make excavations in the street to lay their water-pipes. In doing so they threw up rubbish without properly guarding the same, whereby a stage coach which the plaintiff was driving was overturned and injured, and he, plaintiff, severely injured. Lord ELLENBOROUGH held that the company was clearly liable, even though the work was done by a contractor. In *Waterman v. Conn. & Pass. River R. R. Co.*, 30 Vt. 610, damages were allowed for injuries from surface water, through the unskilful manner in which the road was constructed. But see *Henry v. Vt. Central R. R. Co.*, 30 id. 638, where injury to land resulting from change in the course of a river by a railroad company in necessary erection of their road was held not recoverable, though such erections were unskilfully made. *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512. It must lay its track skilfully in a public street, and is liable for injuries resulting from unskilfulness in that respect. *Worster v. Forty-second Street R. R. Co.*, 50 N. Y. 203. It must not let down the lands of an adjoining owner, whether by a skilful or unskilful prosecution of its work. *Richardson v. Vt. Central R. R. Co.*, 25 Vt. 465. Authority to erect a bridge over a navigable stream, if the navigation is not impeded, does not authorize it even temporarily to obstruct it while erecting the bridge. *Memphis & Ohio R. R. Co. v. Hicks*, 5 Sneed (Tenn.), 427. In *Lawrence v. Great Northern R. R. Co.*, 4 Eng. Law & Eq. 265, a railway company was held liable for not providing proper flood-gates for escape of water, which, by

erection of its road-bed, were prevented from spreading as formerly, even though the act did not provide for their being made. In the *Freehold General Investment Co. v. The Metropolitan R. R. Co.*, Weekly Notes, 1866, p. 66, the defendants, in the construction of their road, were building tunnels under valuable houses, and, among the rest, under the plaintiff's house. Upon a bill for an injunction to restrain them from proceeding until they had provided proper means for securing the house from further injury, the walls having already begun to crack, the Vice-Chancellor, in disposing of the question, said: "The legislature has given power to the defendants to make their works by means of a tunnel, close to and through the midst of valuable houses, and must have foreseen that some damage would be done. . . . But the company are not only bound to make compensation for the damage sustained, but are bound to prosecute the work skilfully, and if there are two ways of doing the work, to choose the one that will do the least injury." In *North Staffordshire R. R. Co. v. Dale*, 8 E. & B. 836, it was held that a railroad company, having carried a highway over its road by a bridge, was bound at all times not only to keep the bridge in repair, but also all approaches thereto. In *Hamden v. N. H. R. R. Co.*, 27 Conn. 158, it was held that a railroad company altering a highway for the purposes of its road is bound to restore it to its former condition, and that this liability continues until it is so restored, and until that is done that it remains a continuing nuisance, rendering it liable for all damages, either to the town or individuals. In *Regina v. Train*, 2 B. & S. 640, it was held that an iron tramway laid in a highway so as to cause the wheels of vehicles to skid and to frighten horses hitting their feet

Thus it is held that authority given to construct a railroad, and to operate it by steam, does not operate as an authority to use engines thereon that are defectively constructed, so as to scatter coals along the line of the road, endangering the property of those through whose lands it passes,<sup>1</sup> nor with smoke-stacks so defectively constructed as to permit the free escape of sparks from the engine or engines, exposing property on the line of the road to imminent danger from fire.<sup>2</sup> Neither does it authorize a constant ringing of the bell or blowing of the whistle to the annoyance of people living along its line, but only such necessary use of those devices as the public safety and the proper running of the trains require.<sup>3</sup> The noise and rumble of the trains, the smoke escaping from the engines, and the jarring occasioned by the proper operation of the road, must be borne as *damnum absque injuria*; but the best and most improved devices must be used that skill and science have devised, to prevent injury from the exercise of the powers given by the grant, either to public or individual rights.<sup>4</sup> When this is done, the grant

on them, is a nuisance, and that no degree of public benefit will operate as a defence. In *Johnson v. Atlantic R. R. Co.*, 35 N. H. 569, it was held that it is the duty of a railroad company to construct culverts and ditches sufficiently low to carry off water set back upon lands by the construction of its road, when this can be done without difficulty. In *Sabin v. Vt. Central R. R. Co.*, 25 Vt. 363, defendant was held liable for not removing stones thrown upon land in process of blasting for their road-bed. In *Pittsburgh, &c. R. R. Co. v. Gielleland*, 56 Penn. St. 445, it was held that a culvert so unskillfully constructed as to be insufficient to carry off the water of a stream in ordinary high water renders the company liable for all injuries resulting therefrom. *Slatten v. Des Moines Valley R. R. Co.*, 29 Iowa, 154; *Terre Haute, &c. R. R. Co. v. McKinley*, 33 Ind. 274; *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304; *Attorney-General v. Metropolitan Board of Works*, 1 H. & M. 320; and the question of proper execution of the works is a question of fact. *Ware v. Regents Canal Co.*, 3 D. & J. 227; *Coats v. Clarence R. R. Co.*, 1 R. & M. 181.

<sup>1</sup> *King v. Morris & Essex R. R. Co.*, 18 N. J. Eq. 397; *Cleveland v. Grand Trunk R. R. Co.*, 42 Vt. 449.

<sup>2</sup> *Gandy v. Chicago, &c. R. R. Co.*, 30 Iowa, 420. See *Jackson v. Same*, 31 id. 176; *Kellogg v. Chicago, &c. R. R. Co.*, 26 Wis. 223; *Bedell v. Long Island R. R. Co.*, 44 N. Y. 367; *Case v. Northern Central R. R. Co.*, 59 Barb. (N. Y.) 644. And the fact that a fire is set by sparks from a railroad engine is presumptive evidence that the spark-protector is defective, and throws the burden of the proof of the contrary upon the company. *Bedford v. Hannibal, &c. R. R. Co.*, 46 Mo. 456; *Case v. Northern Central R. R. Co.*, *ante*. See, as to presumption of defects in machinery, *Illinois Central R. R. Co. v. Phillips*, 49 Ill. 234; *Reed v. New York Central R. R. Co.*, 56 Barb. (N. Y.) 493. But see *Indianapolis R. R. Co. v. Paramore*, 31 Ind. 143; *Fitch v. Pacific R. R. Co.*, 45 Mo. 322; *Barron v. Eldredge*, 100 Mass. 455.

<sup>3</sup> *First Baptist Church Society v. R. R. Co.*, 5 Barb. (N. Y.) 79.

<sup>4</sup> *Bell v. Ohio, &c. R. R. Co.*, 25 Penn. St. 161; *Brand v. Hammersmith R. R. Co.*, L. R. 1 Q. B. 130; *Sparhawk v. Union, &c. R. R. Co.*, 54 Penn. St. 401; *Burton v. Philadelphia R. R. Co.*, 4 Harr. (Del.) 252. But where the noise is unnecessary, the rule is otherwise, or when the use complained of can be dispensed with in a populous locality. *Mumford v. Ox., W.*

is a full protection ; failing in that, it is no protection at all to the extent of the injury occasioned or threatened by such neglect, and for the injuries resulting therefrom, it is liable both to indictment in behalf of the public, and to respond in damages to individuals injured thereby.<sup>1</sup> A railroad may become a nuisance, and indictable as such, when its trains are habitually run without a reasonable regard to lives or property, or to public safety,—as, where it habitually runs them without giving reasonable and proper signals ; and this, too, whether it is required by any statute to do so or not. It is among the obligations implied, when the authority is given to do a dangerous act.<sup>2</sup>

& W. R. R. Co., 1 H. & N. 34. In an action to recover damages caused to a house and lot by the construction and operation of railroad tracks in a street in close proximity to the plaintiff's property, the true measure of damages is the loss sustained by the nuisance ; the injury from jarring the building, and the throwing of cinders and smoke upon the plaintiff's premises ; and the depreciation of the value of the property by these causes may be considered, but not general depreciation in value from other causes, such as mere inconvenience in approaching or leaving the property, or the noise and confusion in the vicinity. The injury must be physical. *Chicago, Milwaukee, & St. Paul R. R. Co. v. Hall*, 90 Ill. 42. Where, after the construction of a railroad over a portion of a lot, the owner erected a dwelling-house upon the lot, in close proximity to the road, and occupied the same as a residence, it was held that the owner, having built the house with full knowledge that it would be affected by the road, could not recover for the loss which he thus knowingly and voluntarily incurred ; but that, so far as the house sustained a direct physical injury by the company, which it was its duty to avoid, as against all adjacent property, the owner was entitled to recover. *Indianapolis, Bloomington, & Western Ry. Co. v. McLaughlin*, 77 Ill. 275. Where a number of persons living along the line of a railway running from the main line to a granite quarry, operating under charter, and running through the streets of a town with the consent of the council thereof, brought

suits against the company for damages resulting from the making of embankments and cuts in the street which ran in front of their property, and from the use of an improper engine, which cast cinders and soot into plaintiffs' yards and houses, and the running thereof at irregular times, a bill by the company to settle the rights of all parties, and to prevent multiplicity of suits, was held not to be without equity. *Guess v. Stone Mountain Granite & Ry. Co.*, 67 Ga. 215. In *Cooper v. North British Ry. Co.*, 35 Jurist, 295, 1 Macph. (Sc.) 499, where authority was given to defendants to erect workshops to manufacture machinery, apparatus, etc., it was held that this would not justify the erection of a shop for hardening rails in a locality where the noise would be a nuisance *Randle v. Pacific R. R. Co.*, 65 Mo. 25.

<sup>1</sup> *Costello v. Syracuse, &c. R. R. Co.*, 65 Barb. (N. Y.) 92 ; *Chicago v. Quaintance*, 58 Ill. 389 ; *Spaulding v. Chicago, &c. R. R. Co.*, 30 Wis. 110 ; *King v. Morris & Essex R. R. Co.*, 3 C. E. Green (N. J.), 397 ; *Queen v. Darlington Board of Health*, 5 B. & S. 562 ; *Brine v. Great Western R. R. Co.*, 2 id. 402 ; *Broadbent v. Imperial Gas Co.*, 7 D. M. & G. 600 ; *Caledonian Ry. Co. v. Sprot*, 2 Macph. 449.

<sup>2</sup> *Louisville, &c. R. R. Co. v. Comm.*, 13 Bush (Ky.), 388. In *Louisville, Cincinnati, & Lexington R. R. Co. v. Com.*, 80 Ky. 143, a railway which habitually ran its trains at a high rate of speed—fifteen or twenty miles an hour—over a turnpike crossing, without giving proper signal, was held guilty of an indictable nuisance.

**SEC. 214. Authority to erect Bridges over navigable Streams.**— Authority given to erect a bridge across a navigable stream, even in the absence of a provision that it should be erected with proper draws, and in such a way as to interfere as little as possible with navigation, would undoubtedly be held to be subject to such restrictions, but as that question will not be likely to arise, it will not be profitable to discuss it here. It is sufficient to say that when authority is given to erect a bridge over a navigable stream in such a way as to interfere as little as possible with its navigation, the authority does not operate as a protection, if the bridge interferes with navigation in any degree unnecessarily, which, by a more skilful construction, or by the adoption of other methods or better appliances, might be avoided.<sup>1</sup>

**SEC. 215. Exemption from Indictment for public Nuisance.**— An individual or corporation acting strictly within the scope of legislative power cannot be indicted for a public nuisance. The legislative grant is a license to do the act and operates as a complete and full immunity from prosecution, either civilly or criminally, on the part of the public.<sup>2</sup> But it by no means follows that because an act is done under legislative authority, the person doing the act cannot be punished therefor by indictment if the act creates a public nuisance. If the act is in excess of the power given,<sup>3</sup> or if it is

<sup>1</sup> *State v. Parrott*, 71 N. C. 311; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 237; *Columbus Ins. Co. v. Peoria Bridge Association*, id. 70; *Columbus Ins. Co. v. Curtenius*, id. 209; *Attorney-General v. Hudson River R. R. Co.*, 9 N. J. Eq. 526; *Newark Plank Road Co. v. Elmer*, id. 754; *Com. v. New Bedford Bridge Co.*, 2 Gray (Mass.), 339; *Com. v. Nashua & Lowell R. R. Co.*, id. 54; *Com. v. Erie & N. E. R. R. Co.*, 27 Penn. St. 339.

<sup>2</sup> *People v. Law*, 34 Barb. (N. Y.) 494; *Hogeboom, J.*; *People v. New York Gas Co.*, 64 id. 55; *Davis v. Mayor*, 14 N. Y. 506; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; *People v. Platt*, 17 Johns. (N. Y.) 195; *Stoughton v. State*, 5 Wis. 271; *Com. v. Reed*, 34 Penn. St. 275; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Carhart v. Auburn Gas Co.*, 22 id. 297; *Rex v. Pease*, 4 B. & Ad. 30; *Clark v. Syracuse*, 13 Barb. (N. Y.) 32; *Anderson v. R. R. Co.*, 9 How. (N. Y.) Pr. 553; *Danville, &c. R. R. Co. v. Comm.*, 73 Penn. St. 29.

Where a municipal corporation by its charter or general law is authorized to do so, a license granted by it to a person to exercise a certain trade or business—as a distillery—is a protection against an indictment by the State. *Lewis v. Behan*, 28 La. An. 130; *People v. Detroit, &c. Plank Road Co.*, 37 Mich. 195.

<sup>3</sup> *Com. v. Old Colony R. R. Co.*, 14 Gray (Mass.), 93; *Donnahan v. State*, 8 Sm. & M. (Miss.) 649; *Glover v. North Staffordshire R. R. Co.*, 16 Q. B. 912; *Hentz v. L. I. R. R. Co.*, 13 Barb. (N. Y.) 646; *In re Penny*, 7 E. & B. 660; *Moses v. R. R. Co.*, 21 Ill. 516; *Imperial Gas-light Co. v. Broadbent*, 7 H. L. 600; *Ware v. Regents Canal Co.*, 3 D. & J. 227; *Frewin v. Lewis*, 4 M. & C. 255; *Oldaker v. Hunt*, 6 D. M. & G. 389; *Caledonian R. R. Co. v. Colt*, 3 Macq. 838; *New Albany R. R. Co. v. O'Dailey*, 12 Ind. 551; *Brine v. Great Western R. R. Co.*, 2 B. & S. 402; *Wetmore v. Story*, 22 Barb. (N. Y.) 414; *Comm. v. Erie & N. E. R. R. Co.*, 27

done in a manner not within the reasonable contemplation of the legislature, to be gathered from a fair construction of the grant,—as, if it is not a necessary and probable result of the exercise of the power conferred,—the act will be no protection against liability, either civilly or criminally.<sup>1</sup> It is only against such consequences as are fairly within the contemplation of the legislature in conferring the authority, and such results as are necessarily incident to its being done,—in other words, such results as are the natural and probable consequence of an exercise of the power at all,—that the grant operates as a protection.<sup>2</sup> Beyond that it affords no protection whatever. It is sometimes laid down in elementary works, and appears in the opinions of courts, that that which is authorized by the legislature cannot be a nuisance. This is clearly erroneous in the sense in which it is generally understood. That which is authorized by the legislature, within the strict scope of the power given, cannot be a *public* nuisance, but it *may* be a *private* nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom, if the nuisance results from an invasion of property by a physical agency.<sup>3</sup>

Penn. St. 339. And the fact that the excess arises from a misapprehension of the power conferred is no excuse. *Mohawk & H. R. Co. v. Artcher*, 6 Paige (N. Y.), 84; *Sandford v. R. R. Co.*, 24 Penn. St. 378.

<sup>1</sup> *Steele v. Western Inland Locks Navigation Co.*, 2 Johns. (N. Y.) 283; *Reg. v. Bradford Navigation Co.*, 6 B. & S. 649; *Delaware Canal Co. v. Comm.*, 60 Penn. St. 367.

<sup>2</sup> *Rex v. Pease*, 4 B. & Ad. 30; *Lawrence v. R. R. Co.*, 16 Q. B. 643; *Regina v. Charlesworth*, id. 1012; *Abraham et al. v. The Great Northern Ry.*, id. 586.

<sup>3</sup> *People v. New York Gas Co.*, 64 Barb. (N. Y.) 55; *Carhart v. Auburn Gas-light Co.*, 22 id. 297; *Cleveland v. Citizens' Gas-light Co.*, 20 N. J. Eq. 201; *Fletcher v. Auburn, &c. R. R. Co.*, 25 Wend. (N. Y.) 462; *First Baptist Church v. Schenectady, &c. R. R. Co.*, 5 Barb. (N. Y.) 79; *Steele v. Western Inland Locks Navigation Co.*, 2 Johns. (N. Y.) 283; *Lexington, &c. R. R. Co. v. Applegate*, 8 Dana (Ky), 289; *Spencer v. London & Birmingham R. R. Co.*, 8 Sim. 193; *Walker v. Board of Public Works*, 16 Ohio, 540; *Manhattan Gas Co. v. Barker*, 36 How. Pr. (N. Y.)

233. In *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165, SUTHERLAND, J., said: "The effect of the grant is simply to authorize the defendant to erect his dam as he might have done if the stream had been his own, without the grant. *The dam could not be indicted as a public nuisance and abated. The only remedy for those injured is by action.*" *People v. Platt*, 17 Johns. (N. Y.) 195; *Brown v. Cayuga R. R. Co.*, 12 N. Y. 487; *Lawrence v. Gt. Northern R. R. Co.*, 16 Q. B. 643; *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512; *Bradley v. N. Y. & N. H. R. R. Co.*, 21 Conn. 305; *Mahon v. R. R. Co.*, *Lalor's Supp.* 156; *Williams v. N. Y. Central R. R. Co.*, 16 N. Y. 97; *Lyman v. White River Br. Co.*, 2 Aiken (Vt.), 255; *Carpenter v. Horse R. R. Co.*, 11 Abb. Pr. N. Y. (N. s.) 416; *Tinsman v. Belvidere D. R. R. Co.*, 25 N. J. L. 255; *Eastman v. Company*, 44 N. H. 143; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Nevins v. Peoria*, 41 Ill. 502; *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465; *March v. Eastern R. R. Co.*, 19 N. H. 372; *Estabrooks v. R. R. Co.*, 12 Cush. (Mass.) 224; *Wilson v. City of New Bedford*, 108 Mass. 261; 11 Am.



**SEC. 216. Liable to Indictment in certain Cases.**—The legislature may authorize a use of property that will operate to produce a public nuisance, but it cannot authorize a use of it that will create a private nuisance by an actual invasion of one's premises by actual physical agencies which create a nuisance, without compensation therefor, because in such a case there is an actual taking of property. In order to warrant the erection of a public nuisance the act creating it must be clearly within the scope of the grant, and must fairly be within contemplation of the legislature in conferring the power.<sup>1</sup>

Rep. 352; *Phinizy v. Augusta*, 47 Ga. 263; *Curtis v. Eastern R. R. Co.*, 14 Allen (Mass.), 55; *Morgan v. King*, 35 N. Y. 454; *Hinchman v. Paterson Horse R. R.*, 17 N. J. Eq. 75; *Louisville v. Rolling Mill Co.*, 3 Bush (Ky.), 416; *People v. Law*, 34 Barb. (N. Y.) 494; *Delaware & Raritan Canal Co. v. Wright*, 1 N. J. 469; *People v. Kerr*, 38 Barb. (N. Y.) 357; *Ricket v. Metropolitan R. R. Co.*, L. R. 2 H. L. 175; *Biscoe v. Great Eastern R. R.*, L. R. 16 Eq. Cas. 640; *Hamden v. New Haven, &c. R. R. Co.*, 27 Conn. 158; *North Staffordshire Ry. Co. v. Dale*, 8 E. & B. 836; *Estabrooks v. Peterborough R. R. Co.*, 12 Cush. (Mass.) 224; *Regina v. Train*, 2 B. & S. 640; *Eagle v. Charing Cross R. R. Co.*, L. R. 2 C. P. 638; *Johnson v. Atlantic R. R. Co.*, 35 N. H. 569; *Eaton v. Boston & Concord R. R. Co.*, 51 id. 504; 12 Am. Rep. 147; *Alton, &c., R. R. Co. v. Deitz*, 50 Ill. 210; In *Tinsman v. The Belvidere Delaware R. R. Co.*, 25 N. J. L. 255, the court places the liability of railroad companies or other companies acting under legislative authority upon the same footing with individuals using their own premises for a similar purpose. "The grantee of a franchise for private emolument, as a railroad company," say the court, "may be vested with the sovereign power to take private property for public use, on making compensation, but is not clothed with the sovereign's immunity from resulting damages. This power leaves their common-law liability for injuries done in the exercise of their authority precisely where it would have stood if the land had never been acquired in the ordinary way." In this case the plaintiff was held entitled to recover for injuries sustained by him, by reason of being deprived of free access to an eddy

and creek's mouth, in which he had the right to store lumber; and the court held that the fact that the creek was navigable and the legislature had the right to control it was no defence to the action. In *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512, the court held that a legislative grant to construct a railroad can give no authority to invade any private rights without just compensation; it confers a franchise simply, and the title and rights of a private corporation, but no exemption for wrongs to private property; that if it so excavates and removes the banks of a stream as to cause it to overflow, it is liable for all the injuries that ensue; and that as to them, in all respects, the same rule of liability exists as against an individual doing the same acts upon his own land. It is liable for injuries resulting from diverting a river, *Cott v. Lewiston R. R. Co.*, 36 N. Y. 214; and for injury resulting from the occupancy of a public street in front of one's premises, of which he is the owner of the fee, *Fletcher v. Auburn, &c. R. R. Co.*, 25 Wend. (N. Y.), 462; *Presb. Soc. v. Auburn, &c. R. R. Co.*, 3 Hill (N. Y.) 567; or for shutting off access to other parts of one's premises, *Miller v. Auburn, &c. R. R. Co.*, 6 Hill (N. Y.), 61.

<sup>1</sup> *Lawrence v. The Great Northern Ry. Co.*, 16 Q. B. 643. See *Com. v. Reed*, 34 Penn. St. 275; *Delaware Div. Canal Co. v. Com.*, 60 Penn. St. 367, where a similar doctrine was held, when the defendant purchased a canal of the State, and maintained its banks in such a manner that the water escaped, and gathering in eddies, became stagnant and emitted noxious smells.

This question was ably discussed in an English case<sup>1</sup> which has been previously referred to in this chapter. In that case CROMPTON, J., said: "It is conceded that we are not to consider the case as against the company. The indictment charges the defendants with a public nuisance by collecting and keeping exposed in their canal, foul and polluted water. It is clear that they did take and collect the water of the Bradford Beck and bring it into the head of their canal, so that filth and mud were collected there, and caused an undoubted nuisance. The foul water was more stagnant in the canal than it would been in the beck, and the defendants are liable unless they are authorized by some statute to create this nuisance. The lessees may justify, as the company might, under the powers of the act of Parliament. But is there any provision in the act that the company may commit a nuisance? Whether an authority is given or duty imposed depends on the intention of the legislature. Here the company are authorized to take the water of certain becks and make a canal, but that does not involve their bringing feculent matter and allowing it to accumulate in their canal so as to be a nuisance.

"The only question is whether the present case is within the authority of *Rex v. Pease*.<sup>2</sup> There, the legislature must have intended to authorize the nuisance which was the subject of the indictment, and the judgment proceeded on that ground. In the argument of that case (page 36) the observation of PARKE, J., in *Rex v. Sir John Morris*,<sup>3</sup> on a local act which enabled proprietors of lands, etc., to make railways through such lands and across and along any roads to communicate with another railway, was cited. He said (pages 449, 450): 'Supposing the seventieth section [of the act] to be taken alone, it must at least be understood with the limitation, that where a railway is laid upon another road, sufficient space be left independently of it for the public to pass.' Therefore, *prima facie*, some nuisance was intended. And in *Rex v. Pease*, the same learned judge, in delivering the judgment of the court, after referring to the clause of the special act, said (pages 41, 42): 'The legislature therefore must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and consequently that travellers upon the highway would be, in all probability, incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unrea-

<sup>1</sup> *Queen v. Bradford Navigation Co.*, 6 B. & S., 649.

<sup>2</sup> 4 B. & Ad. 30.

<sup>3</sup> 1 B. & Ad. 441.

sonable or inconsistent in supposing that the legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public, in the more speedy travelling and conveyance of merchandise along the new railroad.'

"It is agreed on both sides in the present case that a new state of things, which the legislature never intended or contemplated, has arisen; and, therefore, the present case is not within *Rex v. Pease*. The only way in which such a nuisance as this can be legitimated is by showing that the legislature intended to legitimate it. Here, power was given to the company to take the water of certain becks; but not to take the water at all times so as to cause pollution of the atmosphere and cause disease. Power was also given, which they have not used, to make reservoirs for supplying their canal with water. It is not found that it was necessary for the purposes of the canal that they should make this nuisance or that they should take the water of the Bradford Beck."

SHEE, J. "It is admitted that the canal in its present state is a nuisance; and the question is, whether the act of Parliament under which it was authorized to be made exempts the lessees from the legal consequences of having created a nuisance. Assuming the act authorized the company to take the water of the Bradford Beck, it was, at the time the act passed, sufficiently pure not to be a nuisance when collected, and the authority to take it in its then state is no authority for taking it in such a state as that; when collected in a stagnant form, it becomes a nuisance. *Rex v. Pease* is distinguishable; there, the act of Parliament authorized the nuisance, namely, the use of locomotive steam engines in the way and the place in which, and where, their use was a nuisance. But if a new mode of using locomotive engines had been afterward discovered, producing effects different and much more injurious to the public than the effect of engines constructed and worked at the time when the act passed, that would be a nuisance not within the contemplation of the legislature, and not authorized by the act."

**SEC. 217. Power of the Legislature.**—If there were no constitutional restrictions imposed upon the legislature against the taking of private property for public purposes without compensation, the power of the legislature would of course be unlimited and supreme, and it might impose such burdens upon private rights without

compensation, as it pleased, for the public good; but where, as is the case in this country, the right is restricted by requiring compensation, the legislature cannot confer upon a corporation the right to do any act that imposes a burden upon the property of others that amounts to an actual *taking* of property for public purposes, so as to exempt such corporation from liability for all damages that result from the exercise of their franchise that, in law, amounts to a taking of property. Thus, it has been held that a legislative grant did not exempt gas companies from liability for damages resulting from noxious smells emitted from their works,<sup>1</sup> or from damages resulting from the pollution of the water of a stream by turning its refuse matter therein;<sup>2</sup> or an individual or corporation from damages arising from the obstruction of a navigable stream,<sup>3</sup> or from excavating lands so as to let down adjoining soil,<sup>4</sup> or so as to injure adjacent houses;<sup>5</sup> or making erections that hide the ancient lights of another;<sup>6</sup> setting back the water of a stream upon the lands of adjoining owners;<sup>7</sup> turning surface water upon another's premises;<sup>8</sup> diverting the water of a stream;<sup>9</sup> causing water to rise in a stream by erection of embankments, so as to percolate into another's cellars, or so as to cut off the drainage of lands;<sup>10</sup> flooding the lands of another by cutting through an embankment that confines a stream within its proper banks;<sup>11</sup> by erecting embankments that cut off access to a public street;<sup>12</sup> or the cutting off of access to a navigable stream where a right of access has been acquired and is annexed to an estate as an easement;<sup>13</sup> by the casting of rocks upon adjacent lands in the

<sup>1</sup> *People v. New York Gas-light Co.*, 64 Barb. (N. Y.) 55.

<sup>2</sup> *Carhart v. Auburn Gas-light Co.*, 22 Barb. (N. Y.) 297.

<sup>3</sup> *Jolly v. Terre Haute Draw Bridge Co.*, 6 McLean (U. S.), 237.

<sup>4</sup> *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465.

<sup>5</sup> *Biscoe v. Great Eastern Ry.*, L. R. 16 Eq. Cas. 640.

<sup>6</sup> *Eagle v. Charing Cross R. R. Co.*, L. R. 2 C. P. 638.

<sup>7</sup> *Lawrence v. The Great Northern R. R. Co.*, 16 Q. B. 643.

<sup>8</sup> *Waterman v. Vermont Central R. R. Co.*, 25 Vt. 707; *Estabrooks v. Peterborough*, 12 Cush. (Mass.) 224.

<sup>9</sup> *Cott v. Lewiston Ry. Co.*, 36 N. Y.

214; *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 49.

<sup>10</sup> *Wilson v. New Bedford*, 108 Mass. 261.

<sup>11</sup> *Del. & Raritan Canal Co. v. Lee*, 22 N. J. L. 243; *Eaton v. Boston, Concord, & Montreal R. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147; *Lawrence v. The Great Northern R. R. Co.*, 16 Q. B. 643.

<sup>12</sup> *Wetmore v. Story*, 22 Barb. (N. Y.) 414; *Wood v. Stourbridge*, 16 C. B. N. S. 222; *Chamberlain v. West End R. R. Co.*, 2 B. & S. 605; *Drake v. Hudson River R. R. Co.*, 7 Barb. (N. Y.) 508; *Spencer v. London & Birmingham R. R. Co.*, 8 Sim. 193.

<sup>13</sup> *Duke of Buccleugh v. Metropolitan Board of Works*, L. R. 5 H. L. Cas. 418.

process of blasting for the road-bed of a railroad, and leaving them upon the land;<sup>1</sup> injury from noise, by erection of workshops near dwellings and places of business, disturbing the comfortable enjoyment thereof, and injuring property by varying agitating noises and motions;<sup>2</sup> by erecting embankments so as to prevent escape of surface water from adjacent lands, without proper culverts, where they can be conveniently made;<sup>3</sup> and thus, generally, it may be said that a legislative grant furnishes no immunity from liability for damages caused by the exercise of the franchise that amounts to the taking of property within the legal interpretation of the term; and that this applies to the taking of an easement or any interest in land even less than a fee.<sup>4</sup>

**SEC. 218. Legislative Grants do not exempt Company from Liability for private Damages in certain Cases.** — It by no means follows that all consequential injuries resulting from a public work are the subject of an action on the ground of nuisance; for when the act is lawfully exercised in a lawful way, no liability exists for resulting damages, unless the injury results from what might fairly be said to amount to an actual taking of property.<sup>5</sup> REDFIELD, J., in a

<sup>1</sup> *Sabin v. Vermont Central R. R. Co.*, 25 Vt. 363.

<sup>2</sup> *Mumford v. Oxford, &c. Ry. Co.*, 1 H. & N. 34; *Cooper v. North British Ry. Co.*, 35 Jur. 295; 1 Macph. (Sc.) 499.

<sup>3</sup> *Johnson v. Atlantic, &c. R. R. Co.*, 35 N. H. 569.

<sup>4</sup> REDFIELD, J., in *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 66.

<sup>5</sup> See *Cameron v. Charing Cross R. R. Co.*, 19 C. B. N. s. 764. In some of the States, the statute provides for damages of this character. Thus, in *New York & New Haven R. R. Co. v. Bradley*, 21 Conn. 294, the charter of a railroad company provided that it should be lawful for the company to enter upon and use all such real estate as should be necessary for them; that they should be holden to pay all damages that should arise to any person or persons; and if the person or persons to whom such damages should so arise and said company could not agree as to the amount of such damages, three judicious and disinterested free-holders should be appointed by the Superior Court, who should assess just damages to the person or persons whose real estate should be

taken or injured; that the railroad should not be opened across the land of any person until the damages assessed should have been paid, or secured to be paid; that whenever it should be necessary for the construction of their road to intersect any highway, the company were authorized to construct it across or upon such highway, but they were required to restore it to its former state, or in sufficient manner not to impair its usefulness. B., owning a building and land on a street in New Haven intersected by said railroad, brought his action against the company, alleging that they had made a large excavation for the bed of their railroad in the land adjoining the plaintiff's, and so near his building and so deep as to weaken its foundation, and render it unsafe for use, and raised in the street, opposite and near the front of said building, an embankment of much greater height than the street was before, thereby obstructing the passage to and from his building, darkening the windows, obstructing the air, and rendering the building unfit for occupation. The defendants justified under their charter, averring that they paid, before the

Vermont case,<sup>1</sup> very ably discusses this question, and announces a doctrine substantially in consonance with this. In that case the plaintiff sought to recover for consequential injuries arising from the construction of the defendant's railroad in the village of Burlington, upon the ground that the excavations and embankments made by the defendants in the necessary construction of their road prevented the free escape of surface water, arising from rains and the melting of snow, from the streets, so that it was sent into his store and upon his premises to his damage, and thereby his premises were rendered less accessible from the

doing of the acts complained of, all the damages caused by the construction of their road to the owners of real estate within its limits. On a demurrer to the plea it was held, 1. That the acts of the defendants did not constitute a *taking* by them of the property of the plaintiff, within the meaning of the constitution of this State, or of the charter of the defendants. 2. That under the charter of the defendants, persons whose property had not been taken, in this sense of the term, but who had sustained incidental or consequential damages by the authorized works of the defendants, were entitled to compensation. 3. That as the injuries to the plaintiff resulting from the acts complained of were of the latter description, and as no compensation had been made for injuries of this character, the plaintiff was entitled to recover. In England, under statutes which provide for compensation for lands injuriously affected, and to persons interested therein, it is held that a person who has an easement in lands taken may, as soon as the damage arises, claim compensation for the injury. Thus, in an early case involving this question, PARKER, B., said: "I think the sections in the act of Parliament which enabled the company to treat with persons interested in the land do not apply to persons who have a mere *easement*, or right of passage over the land. All the company want to purchase is the lands themselves, and they must treat with those who have an interest in them, either as tenants in fee, for life, or for years, in severalty or in common. The company are also bound to make compensation to any person interested in lands, or having a right of way

or easement into or over lands, for any damage he may sustain in consequence of the works performed by the company under or by virtue of the powers of the act of Parliament; and in this case, if the plaintiff has sustained any real injury by the division of his land by the railroad, and if they do not put him in the same situation as he was before, by putting a bridge where a railway is, he will be entitled to recover full compensation from the company." *Thickness v. Lancaster Canal Co.*, 4 M. & W. 493. It seems also that a party whose rights are thus injured may apply for a *mandamus* for a jury to ascertain the damages done to his rights, and to compel their payment. Thus, where a *mandamus* was applied for by a person who alleged in his petition that the company had raised the level of a brook into which the sough of a coal mine had been accustomed to empty itself, and thereby caused the water of the brook to flow into the sough and inundate and stop his coal-works, it was held that it was a question for the jury whether any damage had been done, and that the allegation of the plaintiff that he was injured by the diversion of the brook, was sufficient to induce the *mandamus*. *Reg. v. North Midland Ry. Co.*, 2 Railw. Cas. 1. But under the Statute 8 & 9 Vict. c. 20, § 55, an action on the case lies for an injury to a right of way over any road interfered with, if another sufficient road has not been made. See also 2 Railw. Cas. 748; also *Ry. v. Manchester, &c. Ry. Co.*, 1 Railw. Cas. 523.

<sup>1</sup> *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 67.

street; that before the erection of the plaintiff's road, people could safely hitch their horses in front of his premises, and that he could safely drive to and from his premises with horses and carriages. The court held that the plaintiff was not entitled to recover the damages ensuing from these acts of the company, upon the ground that, even if the acts had been done by an individual clothed with no special powers from the State, it would not have created an actionable injury. The work done was lawful. It was performed prudently and "with as little injury as possible to the plaintiff's property consistently," etc. The learned judge said: "In the absence of all statutory provisions to that effect, no case, and certainly no principle, seems to justify the subjecting a person, either *natural* or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damages to other persons in their property or business. This always happens more or less in all rival pursuits, and often, where there is nothing of that kind, one mill or one store or school injures another. One's dwelling is undermined or its lights darkened, or its prospect obscured and thus materially lessened in value, by the erection of buildings upon the lands of other proprietors. One is beset with noise or dust or other inconvenience, by the alteration of a street or more especially by the introduction of a railway, but there is no redress in any of these cases. The thing is lawful in the railroad as much as in the other cases supposed." In the same opinion the court disposes of a question between one Whitcomb and the same defendant, for injuries resulting from a neglect of the defendant to build a proper sluice or culvert for the passage of a stream of water, whereby the plaintiff's lands were injured. For the neglect of the defendant to erect such a culvert as was necessary and sufficient for that purpose, the court held that the defendant was clearly liable both at common law and under the provisions of its charter.

**SEC. 219. Implied Condition, that the Franchise shall be properly exercised.** — The conferring of special privileges upon an individual or corporation to exercise a particular franchise is always upon the implied understanding that the franchise shall be prudently exercised, and in such a manner as to inflict the least injury upon others. It is upon this principle that it is held that where there are two modes of exercising the right, by one of which it would be a

nuisance to others, and by the other of which it would not, the method by which the nuisance would be avoided must be adopted. Corporations are given large latitude for the exercise of a reasonable discretion in the prosecution of their work, but they are subject to the supervision of the courts; and if they abuse this discretion, and exercise it in a careless or unreasonable manner, redress may be had for damages resulting therefrom, either at law or in equity.<sup>1</sup> Damages that result from a careless or unreasonable exercise of their powers are not treated as covered by the franchise, or as having been contemplated by the act conferring the authority; consequently a land-owner whose land has been taken under the grant, and whose damages have been appraised and paid, is not thereby debarred of a remedy for damages arising from such a course, whereas he would be if the damages arose from a prudent and reasonable exercise of the powers conferred. Such damages are not regarded as covered by the appraisal or award, and may be recovered by him, as well as by one whose land has not been taken; as all such acts are regarded as being *ultra vires* and not protected by the grant.<sup>2</sup> The real test is really this: all the natural and probable consequences of the exercise of the power given may be said to have been within the contemplation of the grant; but those results which are a *possible*, but not the necessary result thereof, are *not* covered by the grant, and liability exists therefor as much as though the legislative power had never been given.

**SEC. 220. What is a Taking of Property.**—In determining the scope and powers of an individual or corporation under a legislative grant, reference must always of course be had to the language of the grant, to ascertain the nature and extent of the powers granted, as well as the intent of the legislature. There can be no question that the legislature has full and ample power to exempt from lia-

<sup>1</sup> *Whitcomb v. Vermont Central R. R. Co.*, 25 Vt. 49; *Regina v. Scott*, 3 Q. B. 543. Where a railroad company is authorized to construct its road across a highway upon condition that it shall restore the highway to its "former state" or in "a sufficient manner not to impair its usefulness," it is not authorized to appropriate any part of the highway by obstructions which materially impair its usefulness for the purposes of public travel. *Little Miami R. R. Co. v. Comm. of Greene*, 31 Ohio St. 338.

<sup>2</sup> *Eaton v. Boston, Concord, & Maine R. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147; *Baltimore & Potomac R. R. Co. v. Magruder*, 34 Md. 79; 6 Am. Rep. 311; *Cooper v. N. British R. R. Co.*, 35 Jur. 295; *Fletcher v. R. R. Co.*, 25 Wend. (N. Y.) 462; *Stoughton v. State*, 5 Wis. 291; *People v. Law*, 34 Barb. (N. Y.) 494; *Hinchman v. R. R. Co.*, 17 N. J. 75; *Potter's Dwaris on Statutes*, 75; *First Baptist Church v. R. R. Co.*, 5 Barb. (N. Y.) 79; *Steele v. Western Inland Nav. Co.*, 2 Johns. (N. Y.) 283.



bility for injuries that do not operate as an actual taking of property within the letter and spirit of constitutional provisions. It may not always be easy to determine what really amounts to a taking of property, but it is safe to say that, whenever the exercise of the right operates to destroy an easement incident to real property,<sup>1</sup> or amounts to an actual physical invasion of property by some agency which produces injury thereto, or imposes a burden thereon, this is a taking of property. There need not be an exclusive appropriation of the property, but such an interference with the beneficial use thereof as operates an essential abridgment of the owner's rights incident to, and an essential part of, the estate.<sup>2</sup> There ought to be no question that the erection of gas-works, or the setting up of any other noxious trade in the vicinity of premises, that emits noxious odors, which are sent over lands in quantity and volume sufficient to essentially interfere with the use of that air for the ordinary purposes of breath and life, so as to constitute a legal nuisance, is such a taking of property as the legislature may not permit without compensation. Strictly speaking, there can be no possible distinction between the actual taking of property, or a part of it, and occupying it for the erection of a railroad track or a gas-house, and invading it by an agency which operates as an actual abridgment of its beneficial use, and possibly a complete and practical ouster. By the erection of such works a burden is imposed upon the estate; the estate is actually invaded by an invisible, yet pernicious agency, that seriously impairs its use and enjoyment, as well as its value. The impregnation of the atmosphere with noxious mixtures that pass over land is an invasion of a natural right, incident to the land itself, and essential to its beneficial enjoyment. The right to pure air is said to stand upon the same principle as the right to pure water; it is an incident of the land, annexed to and a part of it, and it is as sacred as the right to the land itself.<sup>3</sup> Therefore, I apprehend that according to a strict construction of the Constitution, the legislature has no power to shield a railway company from liability for the

<sup>1</sup> *Duke of Buccleugh v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Chapman v. Oshkosh R. R. Co.*, 33 Wis. 629.

<sup>2</sup> *Nevins v. Peoria*, 41 Ill. 502; *People v. Kerr*, 37 Barb. (N. Y.) 357; *Wynehamer v. The People*, 13 N. Y. 378. See *Eaton v. Boston, Concord, & Montreal R. Co.*, 51 N. H. 504; 12 Am. Rep. 147, in which SMITH, J., ably discusses this

question and reviews the principal authorities bearing upon the question, — an opinion worthy of careful study. He says: "The principle must be the same, whether the owner is wholly deprived of the use of his land or only partially deprived of it."

<sup>3</sup> *Salvin v. North Brancepeth Coal Co.*, 31 L. T. (N. s.) 156.

consequences of the exercise of its franchise when they produce such results, any more than it has to authorize the flooding of lands or the permanent diversion of a stream.<sup>1</sup> But the courts universally hold that they are exempt from liability for all merely consequential injuries except where the statute otherwise provides, unless the injury is produced by an actual physical agency.

**SEC. 221. Power of Parliament, in England, omnipotent.**—In England the power of Parliament is omnipotent. It is not restricted in the exercise of its discretion in reference to the taking of private property for public purposes, as our State legislatures are; but it is provided by law that compensation shall be made for all lands taken, and for all “injuriously affected.” Under this statute the courts hold that no liability exists except in respect to damages which would have been the ground of an action if the act occasioning it had been done without the authority of the statute.<sup>2</sup> Therefore, the decision of the English courts upon questions of this character are not always applicable to cases arising here, where the legislature is surrounded with constitutional checks and provisions circumscribing and limiting its power.

**SEC. 222. No Remedy can be had for Injuries purely Consequential, etc.**—For injuries that are purely consequential, and are the result of an act done within the scope of the power granted, and which arise from a proper and necessary exercise of the power given, and that can in no sense amount to an actual invasion or taking of property, no remedy can be had by one whose land has not been taken, unless, as is the case in Illinois and some of the other States, the statute provides for compensation for property taken “or

<sup>1</sup> *People v. New York Gas-light Co.*, 64 Barb. (N. Y.) 55; *Carhart v. Auburn Gas-light Co.*, 22 id. 297; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165. In *Pentland v. Henderson*, 17 D. 542, it was held that even though the defendant had a license for the prosecution of his trade in the locality complained of, this did not protect him from liability if his slaughter-house became a nuisance. *Broadbent v. Imperial Gas Co.*, 7 D. M. & G. 450. In *Bamford v. Turnley*, 3 B. & S. 62, it was held that that is a bad law, which, for public benefit, inflicts loss upon a citizen without compensation. *Cooper v. North British Ry. Co.*, 1 Macph. (Sc.) 499; *Mumford v. Oxford, &c. Ry.*, 1 H. & N. 34.

In *People v. New York Gas-light Co.*, 6 Lans. (N. Y.) 467, the court held that the authority conferred by the legislature upon a company to manufacture gas in a certain place precludes the State from proceeding against it by indictment for creating a nuisance by unwholesome smells, etc., if its buildings and processes are of the best kind, and its works conducted in a proper manner. But the court expresses the opinion that they are not thereby protected from liability to individuals who sustain damage therefrom.

<sup>2</sup> *Regina v. Metropolitan Board of Works*, 3 B. & S. 710; *New River Co. v. Johnson*, 2 E. & E. 435.

damaged" by the use.<sup>1</sup> But for consequential injuries resulting from an excess of power, or from an exercise thereof in an im-

<sup>1</sup> Damages having been assessed for the construction of a tunnel, all future damages, arising from vibration and the natural subsidence of the tunnel, were held to be embraced in the assessment. *Croft v. London, &c. Ry. Co.*, 3 B. & S. 436. In *Dodge v. The County Commissioners*, 3 Met. (Mass.) 380, SHAW, C. J., said: "This is an application for a writ of mandamus to the commissioners, requiring them to assess damages for the petitioners against the Eastern Railroad Company. The facts, as set forth in the petition and admitted by the answer of the commissioners, are, that the plaintiffs are owners of a lot of land in Beverly with a house thereon, situated near the limits of the railroad, but not within them; that the railroad is near a ledge of rock; that the company, by the necessary operation of blasting said ledge of rock, for the purpose of grading their railroad, greatly damaged and nearly destroyed the petitioners' house. This case presents the question whether, under the provisions of the Revised Statutes respecting railroads, one can have compensation for damages, whose land has not been directly taken for the site of the railroad, nor for supplying materials for its construction. It is not now necessarily a question, whether the property of an individual, thus necessarily and injuriously affected, and in effect withdrawn from the profitable use and beneficial control of the owner, is appropriated to public uses within the provision of the 10th article of the Declaration of Rights. It was quite competent for the legislature, in providing for the prosecution of a great public work, to require compensation to be made to persons injuriously affected by it, though not a case coming within the express requisitions of the Bill of Rights; and the corporation, by accepting the act of incorporation, became bound by such provisions. It is a question, therefore, depending on the construction of the Rev. Sta. c. 39, which are referred to and made part of their act of incorporation. It is contended, however, on the part of the railroad company, that the remedy for a damage like that of the petitioners, where no land is

taken or appropriated, is not to be sought by an application to the county commissioners, but by an action at common law. But it has been truly answered, on the part of the petitioners, that it is a reasonable and now well-settled principle, that when the legislature, under the right of eminent domain, and for the prosecution of works for public use, authorize an act or series of acts the natural and necessary consequence of doing which will be damage to the property of another, and provide a mode for the assessment and payment of the damages occasioned by such work, the party authorized, acting within the scope of his authority, is not a wrong-doer; an action will not lie as for a tort; and the remedy is by the statute, and not at common law. *Stevens v. Middlesex Canal*, 12 Mass. 466; *Stowell v. Flagg*, 11 Mass. 364; *Lebanon v. Olcott*, 1 N. H. 339; *Calking v. Baldwin*, 4 Wend. (N. Y.) 667. Still the question recurs, whether the statute does provide such remedy in the case stated. The provision is this: "Every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out, and making and maintaining their road, or by taking any land or materials as provided in the preceding section," etc. Rev. Sta. c. 39, § 56. The court are of opinion, that the provision is broad enough to embrace damage done to real estate, like that which the petitioners have sustained. It is like the case of a house situated on the brink of a deep cutting, so as to become insecure, and so that it is necessary to remove it. It is a damage occasioned by the laying out and making of the road. But it is contended that this is to be limited by reference to §§ 54, 55, providing for the taking of lands for the line of the road, and also for materials, if without the limits of the road, by authority of the commissioners. But we can perceive no ground upon which the plain provision of § 56 is to be so limited. It undoubtedly provides for damages in those cases; but it does not limit the provision to those cases. But it is said that the damage done to the petitioners' house, not on the line of the railroad, was acci-

proper or careless or negligent manner, a remedy may be had. The statutory power only operates as a defence where the consequences

dental and consequential, and not the necessary effect of making the railroad. The statement made in the petition, and admitted in the answer, is, that the company located and constructed their railroad through land next adjoining that of the petitioners; that they contracted with persons to blast a ledge of rocks, in such adjoining land, and agreed to indemnify them against any damage arising therefrom; and that, in blasting said rocks, the house of the petitioners was necessarily destroyed. An authority to construct any public work carries with it an authority to use the appropriate means. An authority to make a railroad is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth. In a remote and detached place, where due precautions can be taken to prevent danger to persons, blasting by gunpowder is a reasonable and appropriate mode of executing such a work; and if due precautions are taken to prevent unnecessary damage, is a justifiable mode. It follows that the necessary damage occasioned thereby to a dwelling-house or other building, which cannot be removed out of the way of such danger, is one of the natural and unavoidable consequences of executing the work, and within the provisions of the statute. Of course, this reasoning will not apply to damages occasioned by carelessness or negligence in executing such a work. *Such careless or negligent act would be a tort, for which an action at law would lie against him who commits, or him who commands it. But where all due precautions are taken, and damage is still necessarily done to fixed property, it alike is within the letter and the equity of the statute, and the county commissioners have authority to assess the damages.* This court are therefore of opinion, that an alternative writ of *mandamus* be awarded to the county commissioners, to assess the petitioners' damages or return their reasons for not doing so." In *Sabin v. Vermont Central R. R. Co.*, 25 Vt. 363, the question was in regard to the jurisdiction of the commissioners ap-

pointed to estimate land damages under the defendants' charter as to consequential damages to land not taken. In this case, the words of the act of incorporation are of very great extent in regard to the appraisal of consequential damages to all owners of land or real estate any portion of which is taken, which was the plaintiff's case. The court say: "The owner is to have appraised to him all damages which he shall be likely to sustain by the occupation of his land for a railway. This must include, not only all direct loss, in being deprived of the use of the land taken, but all consequential damage to the remaining lands which may fairly and reasonably be supposed to have been within the contemplation of the commissioners in making their appraisal. This, too, must have reference, not only to the running of the road, but to all special and peculiar annoyances during the construction of the road. But it must be, of course, the ordinary and probable consequences of such acts and operations; that which is not of the ordinary course of consequences is not to be taken into the account; and what is not to be taken into the account in making the appraisal, is not of course barred by the appraisal and payment of the damages. The claim for the use of plaintiff's land by defendants, for a cartway during the construction of their road, would seem to come clearly without the limits of the appraisal. The most that could be said to come fairly within the appraisal, in regard to the use of the adjoining lands, for passage during the construction of the railway, would only extend to gaining access to the land taken. It could scarcely be claimed that the use of the adjoining land for a cartway could be fairly within the contemplation of the appraisal. It could not then be known, with any degree of practical approach towards certainty, how much material at any given point it would become necessary to bring from a distance, or at what point it would be necessary to use the adjoining land as a cartway, or whether any such necessity would occur. And indeed, it is ordinarily supposed that the

are fairly within the contemplation of the legislature, to be gathered from the grant, and the nature of the powers granted, and the loca-

cartways will be upon the six rods taken for the railway. And where a different course is pursued, it is ordinarily done for convenience, and not of necessity. So that such a use, without permission, is ordinarily a mere trespass. There seems, therefore, to be made out a right of recovery to this extent. But the other portion of the plaintiff's claim seems not to come fairly, certainly not clearly, within the same general principle. And it presents a question undoubtedly of very considerable difficulty, when we are inquiring for the mere equity of a particular case. But all cases, and especially cases involving such mighty interests, and ultimately such vast consequences, in the infinity of their number and variety, must be decided upon such general principles of reasoning and justice as commend themselves to the common mind, regardless of those trivial inequalities in detail, which no degree of finite labor or wisdom can fully prevent or equalize. In this case, if ledges, or loose stone of considerable size, are upon the land taken for the track of the road, at the time of the appraisal, it would naturally be in the mind of the appraisers that the stone must be removed in the course of constructing the road; and being of a character only removable ordinarily by blasting, it must occur to them that fragments, more or less, must be thrown upon the adjoining lands, and that it would be necessary to go upon the land to remove such fragments. It would be duty of the company, no doubt, to conduct this blasting in such a way as to do the least possible injury to the adjoining lands; and when by such operation stones were thrown without the limits of the land taken by the road, by unavoidable necessity, to remove them as soon as it could reasonably be done. And the fact that such fragments were embedded in the soil, could make no difference. It could not be allowable for them to suffer the stone to remain thus. There is no necessity for this, but there is for throwing them, to some extent, upon the adjoining land. It seems probable enough, from the facts detailed in the present case,

that the damages sustained arose chiefly from not removing the stone in due season. But the recovery below went upon the ground that the defendants had no right to throw the stone upon the plaintiff's land. It therefore becomes necessary to consider that question. The Massachusetts courts seem to have considered that for damages of this character no action will lie, if there is no want of ordinary care on the part of the company. And no doubt, for any such want of common care, whether in conducting the operations of construction or in not relieving a party from necessary temporary loss or inconvenience, the action should be case, and not trespass. And the party is not to be made a trespasser *ab initio*, by mere nonfeasance. *Stoughton v. Mott*, 25 Vt. 668. Indeed, it has not been claimed that the plaintiff might maintain trespass for this injury, except upon the ground that the defendants had no right to throw the stone upon the plaintiff's land. It seems to us very obvious that the right of the defendants to blast these rocks, in a reasonable and prudent manner, did exist, and was conferred by the decision of the commissioners appraising the plaintiff's damages. And if we test the effect of that adjudication by the ordinary test of the extent of judgments in merging claims, namely, that every claim is barred which was presented, or which might have been presented, under the particular question before the commissioners, there will be little ground of question remaining. The plaintiff had the right to claim, and was of course bound to present his claim, for all damages he was likely to sustain, not only in the running of the road, by fires of engines and the like, but in the building of the road, in the ordinary mode, where blasting is universal, — and this not in respect of the land taken only, but of the remaining land, as has been repeatedly decided. And if this claim was not presented when it might have been, it is barred upon general principles universally recognized, that no one shall be again called in question for what was, or what might and should have been

tion to which it is applicable. Where a person whose lands have been taken under legislative authority, whose damages have been appraised, sustains special damage from the exercise of the power on his soil, his damages are treated as covered by the appraisal, unless they arise from an excess of power, or from a careless or improper execution of the powers conferred.<sup>1</sup> But for injuries resulting

adjudicated. It seems to us that to deny the defendants the right to excavate by blasting is to deny them the right to construct their road; and if they have the right to blast, they are no more liable, or in any different form, from what all citizens are, for the prudent conduct of their legal business, which may be attended with injurious consequences to others. If the throwing of fragments of rock is an unavoidable consequence, then so far as the owner of land taken is concerned, his probable and prospective damage as to his remaining land is to be appraised; and if he does not make such claim, or if more damage occurs than was anticipated at the time, he is equally barred as if his claim had been presented, or less damages had occurred than was appraised. As we have intimated, it is clear that for blasting at improper seasons, thereby causing unnecessary damage to crops, and for doing it in an imprudent or unskilful manner, or for not removing the stone in due time, — and that must be considered the shortest time in which it can be done, and with the least injury to the land, — the party is entitled to his remedy in the proper form. But if the defendants' charter confers the right to do the act, of which, as we have said, there can be no doubt, it seems to us impossible to allow the action of trespass for the original act, thereby treating it as unlawful. And it is too well settled to be now brought in question that no mere omission, or want of care or skill in doing a lawful act, will render such act a trespass by relation. In a late English case, *Sharrod v. London & Northwestern Ry. Co.*, 4 Eng. Law & Eq. 401, it is held that a railway train being under the control of a rational agent, the company are never liable in trespass for any damages done by such train. This is undoubtedly the general rule in relation to master and servant,

unless where the master gives express command to the servant to do the act. But if that rule is to be applied to railway companies to the fullest extent, they are never liable in trespass, for it is scarcely supposable that they would, by a corporate vote, direct an act which should prove unlawful. Certainly they would seldom do this. Most of the acts of railway companies, in their construction and operation, are done by their servants and agents, without any corporate vote. It would be absurd to conjecture for a moment, that the multifarious detail of the business of such a company came even before the board of directors. It is — almost of necessity, in order to secure efficiency and dispatch, with any tolerable degree of safety — intrusted, almost without restriction, to one directing and controlling mind. All the acts, then, of this superintendent, and of his subordinates, who are from necessity the merest instruments, — and the more so the better, as railway men tell us, — should be regarded as the acts of the company. *Vt. C. R. R. Co. v. Baxter*, 22 *Vt.* 365. The case of *Dodge v. The County Commissioners*, 3 *Met. (Mass.)* 380, goes to the full extent of the decision we here make, possibly further."

<sup>1</sup> *Attorney-General v. Birmingham*, 4 *K. & J.* 528; *Johnson v. Providence R. R. Co.*, 10 *R. I.* 365; *Merrifield v. Worcester*, 110 *Mass.* 216; *State v. Parrott*, 71 *N. C.* 311; *Harris v. Thompson*, 9 *Barb. (N. Y.)* 360; *Steele v. Inland Locks*, 2 *Johns. (N. Y.)* 283; *Lexington, &c. R. R. Co. v. Applegate*, 8 *Dana (Ky.)*, 289; *Rex v. Morris*, 1 *B. & Ad.* 441; *Mohawk Bridge Co. v. Utica, &c. R. R. Co.*, 6 *Paige's Ch. (N. Y.)* 554; *Hamilton v. N. Y. & Harlem R. R. Co.*, 9 *id.* 171; *Bloodgood v. Mohawk, &c. R. R. Co.*, 18 *Wend. (N. Y.)* 1; *Fletcher v. Auburn R. R. Co.*, 25 *id.* 462; *Canal Co. v. R. R. Co.*, 9 *Paige (N. Y.)*, 323; *Crittenden v. Wilson*, 5 *Cow.*

from the use of the premises of another, a recovery may be had, and the award of damages does not cover the same.<sup>1</sup> But where a person's premises or a portion thereof are taken, all probable consequential injuries are to be considered as elements of damage, and in some cases, especially where the railway is laid in a public street, such injuries generally constitute the principal element. Thus, in a recent New York case,<sup>2</sup> where an elevated railway was erected in the street in front of the plaintiff's premises so as to interfere with his easement of light and air, and to create noise and vibration by the passage of trains, it was held to amount to a taking of property which entitled the plaintiff to compensation.

(N. Y.) 165; *Brown v. Cayuga R. R.*, 12 N. Y. 487; *Attorney-General v. Met. Bd. of Works*, 1 H. & M. 320; *Ware v. Regents Canal Co.*, 3 D. & J. 227; *Coats v. Clarence, &c. Ry. Co.*, 1 R. & M. 181; *Stainton v. Woolrych*, 23 Beav. 234; *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 459. When the legislature, in the legitimate exercise of the right of eminent domain, has chartered a corporation with certain powers and privileges, the corporation in the exercise of its corporate rights is not liable for consequential damages

arising from such exercise, without fault or negligence on its part. *Boothby v. Androscoggin, &c. R. R. Co.*, 51 Me. 318; *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Hatch v. Vermont, &c. R. R. Co.*, 25 Vt. 49; *Cleveland & Pittsb. R. R. Co. v. Speer*, 56 Penn. St. 325; *Sumner v. Richardson Lake Dam Co.*, 71 Me. 84.

<sup>1</sup> *Eaton v. Boston, &c. R. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147.

<sup>2</sup> *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146.

## CHAPTER XIII.

## EMINENT DOMAIN.

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| <p>SEC. 223. Right of.</p> <p>224. Power may be Delegated.</p> <p>225. Quantity of Land to be taken.</p> <p>226. Public use, What is, etc.</p> <p>227. Public use : Question for the Court, when.</p> <p>228. What Lands, etc., may be taken.</p> <p>229. Franchises of one Railroad may be taken for another, when.</p> <p>230. Exclusive Grants: Presumptions as to Earlier Grants.</p> <p>231. What constitutes a "Taking."</p> <p>232. Conditions precedent.</p> <p>233. Abandonment, Effect of, etc.</p> <p>234. Change of use : Railways on Streets and Highways.</p> <p>235. Preliminary Survey.</p> <p>236. Right to take Materials from adjoining Lands.</p> | <p>SEC. 237. Location of the Road.</p> <p>238. Change of Location.</p> <p>239. Lands intended to be Taken, how Described.</p> <p>240. How Location may be lost.</p> <p>241. Construction of words relating to Terminal Points of a Railway.</p> <p>242. Estate taken by Railway Companies under Proceedings <i>in invitum</i> : Uses of : Remedy of Land-owner for wrongful Use.</p> <p>243. When the Right of Entry vests in the Corporation.</p> <p>244. Trespasser, when.</p> <p>245. Statutory remedy, exclusive.</p> <p>246. Proceedings to condemn.</p> <p>247. Mode of ascertaining Damage : Notice.</p> <p>248. Commissioners, Viewers, etc.</p> |
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SEC. 223. **Right of.**—The right of the sovereign to take the property of private persons for public purposes is an important and essential right, and one which is conceded under all forms of government, and has always existed. In this country, however, a limitation is placed upon the power by the national Constitution, and such property can only be taken for *public* purposes, and upon just compensation.<sup>1</sup> The right is possessed by the State as a necessary

<sup>1</sup> *McLauchlin v. Charlotte R. R. Co.*, 5 Rich. (S. C.) L. 583; *Freedle v. North Carolina R. R. Co.*, 4 Jones (N. C.), L. 89; *Mount Washington Road Co., in re*, 35 N. H. 134; *Hamilton v. Annapolis R. R. Co.*, 1 Md. Ch. 107; *Nichols v. Somerset, &c. R. R. Co.*, 43 Me. 356; *Evansville, &c. R. R. Co. v. Grady*, 6 Bush (Ky.), 144; *Mims v. Macon, &c. R. R. Co.*, 3 Ga. 333; *Enfield Toll Bridge Co. v. Hartford, &c. R. R. Co.*, 17 Conn. 40; *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137; *Edgewood R. R. Co.'s Appeal*, 79 Penn. St. 257; *Giesy v. Cincinnati, &c. R. R. Co.*, 4 Ohio St. 308; *Beekman v. Saratoga, &c. R. R. Co.*, 3 Paige Ch. (N. Y.) 45; *Buffalo, &c. R. R. Co. v. Brainard*, 9 N. Y. 100. The right of eminent domain by which the State is authorized to take private property for public use, when the necessities of the country require it, is an inherent right of the State government; although, under the Constitution, compensation must be made to the owner of property so taken. *Young v. Harrison*, Ga. 130. When a State grants a tract of land an estate in fee passes, as much as if a private individual grants it; but in each case it is subject to the power of being taken for public use on compensation being made. The right rests upon the principle that



attribute of sovereignty, and may be exercised not only in its own behalf, but also in favor of any corporation or individual *for a public purpose*.<sup>1</sup> The right is not derived from the Constitution, *but is inher-*

individual interests must be subservient to those of the public, and must yield when the public exigency requires, but then only upon ample compensation. This doctrine holds in respect to a corporate franchise. *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 40. All grants of land made by a State, although irrevocable, are subject to the right of eminent domain, unless it is expressly relinquished. A grant to a railroad corporation of the right of way over lands before granted to the trustees of a canal company, does not violate the grant made by the State to those trustees. The effect likely to be produced by the opening of the railroad in diminishing the revenues of the canal, is no violation of the contract between the State and the trustees. *Illinois & Michigan Canal v. Chicago & Rock Island R. R. Co.*, 14 Ill. 314. It is a power essentially different from that of *taxation*, in regard to which there is no constitutional restriction, and no guaranty for its just exercise, except in the discretion of the legislature. *People v. Mayor of Brooklyn*, 4 N. Y. 419; *Cincinnati, &c. R. R. Co. v. Clinton Co. Commissioners*, 1 Ohio St. 77; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330. See *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465; *Bennett v. Boyle*, 40 Barb. (N. Y.) 551; *Young v. Buckingham*, 5 Ham. (Ohio) 485; *Works v. Junction R. R.*, 5 McLean (U. S. C. C.), 425; *Bailey v. Philadelphia & Wilmington R. R. Co.*, 4 Harring. 389; *People v. City of St. Louis*, 11 Ill. 351; *Spooner v. McConnell*, 1 McLean (U. S. C. C.), 337; *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How. (U. S.) 518; *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245; *Hogg v. Zanesville Canal Co.*, 5 Ham. (Ohio) 410; *Attorney-General v. Hudson River R. R. Co.*, 9 N. J. Eq. 526; *American Print Works v. Lawrence*, 23 N. J. L. 9. The exercise of this power does not infringe the constitutional provision designed to protect the obligation of contracts; and neither the fact that the property is held under a mortgage, nor

that it belongs to a corporation chartered by a State law, exempts it from the operation of this principle. *Alabama & Florida R. R. Co. v. Kenney*, 39 Ala. N. S. 307. It is not restricted by any disability of the owner of the land appropriated. When, therefore, the State authorizes the appropriation of private property for the public good, the *consent* of the owner is not necessary. The owner has the right, alone, to demand in the mode pointed out by law, the compensation secured by the constitution, as a condition precedent to the vesting of the fee in the company; but has no power of resistance. *East Tennessee & Virginia R. R. Co. v. Love*, 3 Head (Tenn.), 63. The right rests upon the public necessity, and can only be exercised where such necessity exists. *But this necessity relates rather to the nature of the property and the uses to which it is applied than to the exigencies of the particular case*; and it is no objection to the exercise of the power, that lands equally feasible could be obtained by purchase. *Giesy v. Cincinnati, &c. R. R. Co.*, 4 Ohio St. 308. A statute authorizing one railroad corporation to acquire by purchase all the property of another railroad corporation, with a proviso that nothing in the act contained should in any wise affect any right whatever of any stockholder in the latter, and that such purchase should be made with the consent of the stockholders of the latter company, it was held to require the consent of all the stockholders to the transfer. A simple power to purchase upon consent does not involve the doctrine of eminent domain. *Kean v. Johnson*, 9 N. J. Eq. 401.

<sup>1</sup> *Weir v. St. Paul, &c. R. R. Co.*, 18 Minn. 155; *Leisse v. St. Louis, &c. R. R. Co.*, 2 Mo. App. 105. Territorial governments may exercise the power. *Warren v. First Division of St. Paul, &c. R. R. Co.*, 18 Minn. 384; *Swan v. Williams*, 2 Mich. 427. In the exercise of the power of eminent domain the legislature are the exclusive judges of the degree and quality of interest which are proper to be taken from an individual and

ent in the State, and a natural and necessary incident of sovereignty. The Constitution is merely a limitation upon the right, and except for such limitation, compensation would be discretionary with the legislature.<sup>1</sup> The question as to the manner in which it shall be exercised addresses itself to the legislature as a question of propriety, fitness, expediency, rather than as a question of power. It is competent for the government, in its discretion, to exercise it through its public officers, or agents, or through public or private corporations, or private individuals.<sup>2</sup> The right exists in the States as an incident of sovereignty, whether it is expressly conferred by the Constitution or not;<sup>3</sup> and in the exercise of this right they are not

dedicated to the public use, as well as of the necessity of taking it. *De Vraigne v. Fox*, 2 Blatchf. (U. S. C. C.) 95. The propriety of taking private property for a public use is not a judicial question, but one of political sovereignty, to be determined by the legislature, either directly or by delegating the power to public agents, proceeding in such a manner and form as it may prescribe. *People v. Smith*, 21 N. Y. 595. The principle that no action can be maintained for private injuries done by persons in the execution of a public trust, acting with due skill and caution, and within the scope of their authority, does not apply to a private corporation authorized by the legislature to construct works of public improvement by private capital for private emolument. *The grantee of a franchise for private emolument may be vested with the sovereign power to take private property for public use on making compensation, but is not clothed with the sovereign's immunity from resulting damages.* The power conferred leaves the common-law liability for injuries done in the exercise of the authority precisely where it would have stood if the land had been acquired in the ordinary way. *Tinsman v. Belvidere Delaware R. R. Co.*, 26 N. J. L. 148. The State has the constitutional power and right to authorize the taking of private property for the purpose of making railroads or other public improvements of the like nature, paying the owners of such property a full compensation therefor, whether such public improvements are made by the State itself, or through the medium of a corporation or joint stock company.

*Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. (N. Y.) 9.

<sup>1</sup> *Central Branch Union Pacific R. R. Co. v. Atchison, &c. R. R. Co.*, 28 Kan. 453.

<sup>2</sup> *Ash v. Cummings*, 50 N. H. 591; *Secombe v. R. R. Co.*, 23 Wall. (U. S.) 108; *Weir v. St. Paul, &c. R. R. Co.*, ante.

<sup>3</sup> *Boom Co. v. Patterson*, 98 U. S. 403; *Brown v. Beatty*, 34 Miss. 227; *Harvey v. Thomas*, 10 Watts (Penn.), 63. No principle is better established than that the right of eminent domain is inseparably attached to national empire and sovereignty; and that, by the exercise of this right, a nation may surrender the rights of individual subjects or citizens. *Jones v. Walker*, 2 Paine (U. S. C. C.), 688. And that article of the Constitution, which prohibits the taking of private property for public use without just compensation, restrains the power of the general government; and was not intended to apply to the States. *Withers v. Buckley*, 20 How. (U. S.) 84. Every State has the right to make public roads through United States lands lying within it, under its power of eminent domain. The United States have no power to interfere with this right, the State legislatures having exclusive jurisdiction. *United States v. R. R. Bridge Co.*, 6 McLean (U. S.), 517. The general rights of eminent domain within the limits of a State are vested in the State government, in which the ultimate title to all the land within the State may be said to be. Since the State has the general power to take private property for "public use," in any particular case it devolves upon one objecting to such taking to show that it is an exception to

subject to the control of the general government.<sup>1</sup> But the general government possesses the power, and may exercise it in any of the

the general power. The State itself, in taking private property for "public use," may make the application itself, or may make it through the agency of others, whether domestic or foreign corporations, or *a fortiori*, foreign governments, or a member of the domestic government, or even the Federal government itself. A State may exercise a power primarily for her own benefit,—that being a public use,—through the agency of the Federal government, although the Federal government is to receive by the agency assistance in executing its own general duties. Such a law is constitutional where it provides a certain and adequate remedy, by which the owner of the property taken can obtain his compensation without unreasonable delay; and in this case the act providing for the impanelling of a jury to assess the damages, and for an order for the payment of the amount found due into the treasury, to be paid to the owner of the land upon proof of his ownership, was held to provide for a taking by due process of law. *Gilmer v. Lime Point*, 18 Cal. 229. It is incident to the sovereignty of every government that it may take private property for public use, of the necessity or expediency of which the government must judge; but the obligation to make just compensation is concomitant with the right. *Cooper v. Williams*, 7 Me. 273; *Spring v. Russell*, 3 Watts (Penn.), 294; *Henry v. Underwood*, 1 Dana (Ky.), 247; *O'Hara v. Lexington, &c. R. R. Co.*, 1 Dana (Ky.), 232; *Perry v. Wilson*, 7 Mass. 395; *De Varaigne v. Fox*, 2 Blatchf. 95; *Parkham v. Decatur County*, 9 Ga. 341; *Donnager v. State*, 10 Miss. 649; *Brown v. Beatty*, 34 Miss. 227; *Coster v. Tide Water Co.*, 15 N. J. L. 54; *Varick v. Smith*, 5 Paige (N. Y.), 137; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Bailey v. Miltenberger*, 31 Penn. St. 37; *Harding v. Goodlett*, 3 Yerg. (Tenn.) 41; *Stark v. McGowen*, 1 Nott & M. (S. C.) 387; *Lindsay v. Commissioners*, 2 Bay (S. C.), 38; *Ford v. Chicago, &c. R. R. Co.*, 14 Wis. 609. The legislature cannot itself

exercise or delegate the power of seizing and appropriating, *without compensation*, the land of one person for the private benefit of another. *Hall v. Boyd*, 14 Ga. 1. *Royston v. Royston*, 21 id. 161; *Nesbitt v. Trumbo*, 39 Ill. 110; *Burning v. New Orleans, &c. Banking Co.*, 12 La. An. 541; *Hoye v. Swan*, 5 Md. 237; *Dickey v. Tennessee*, 27 Mo. 373; *Concord R. R. v. Greely*, 17 N. H. 47; *Dunham v. Williams*, 36 Barb. (N. Y.) 136; *Grim v. Wissemberg S. Dist.*, 37 Penn. St. 433. The provision in the Constitution, declaring that "private property shall not be taken for public uses without just compensation," does not prohibit the legislature from authorizing a temporary exclusive occupation of the land of an individual, as the incipient proceeding to the acquisition of a title to it, or to an easement in it for a public use, although such occupation may be more or less injurious to the owner. But such occupation becomes unlawful, unless the title or the easement is acquired within a reasonable time; otherwise the occupiers become trespassers *ab initio*. In the case of temporary occupation by a railroad company two years, it was held, under the circumstances of the case, not an unreasonable time. *Nichols v. Somerset, &c. R. R. Co.*, 43 Me. 356. The provision in the Constitution, that the people are deemed to be the original owners of the land, declares an absolute and uncontrollable rule of political sovereignty, and not a presumption of present title available to the people in an ejectionment. *People v. Trinity Church*, 22 N. Y. 44. The title to property is always held upon the implied condition that it must be surrendered to the government either in whole or in part when the public necessities evinced according to the established forms of law demand. *People v. New York*, 32 Barb. (N. Y.) 102. The authority to exercise the right of eminent domain, being in derogation of private right, is to be strictly construed. The use of property which has been taken by right of eminent domain must be held in

<sup>1</sup> *Boom Co. v. Patterson*, *ante*.

States so far as is necessary for the execution of its constitutional powers,<sup>1</sup> or it may exercise it through the State. Indeed, from the time of the formation of the government it has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions, as its agents; and their use has not been regarded as violative of any principle, or as in any manner derogating from the sovereign authority of the Federal government.<sup>2</sup>

**SEC. 224. Power may be Delegated.** — It is now well settled that the power of taking lands for public uses need not be specially conferred in every instance, but may be delegated to corporations or individuals by general laws, making proper provision for compensation and for determining the character of the use to which it is to be applied. But the power must be strictly pursued.<sup>3</sup> The legisla-

accordance with and for the purposes which justified its taking. The right of the commonwealth to take private property without the owner's assent, on compensation made, exists in her sovereign right of eminent domain, and can never be lawfully exercised unless supposed and intended to benefit the public. *Lance's Appeal*, 55 Penn. St. 16. The right to take land under this power is not restricted by any disabilities of the owner. *East Tennessee, &c. R. R. Co. v. Love*, 3 Head (Tenn.), 63.

<sup>1</sup> *Kohl v. United States*, 91 U. S. 367; *Matter of United States*, N. Y. Court of Appeals, 1884; *Darlington v. United States*, 82 Penn. St. 382; *People v. Humphrey*, 23 Mich. 471.

<sup>2</sup> *FIELD, J.*, in *United States v. Jones*, *ante*; *Matter of United States*, *ante*; *Burt v. Merchant's Ins. Co.*, 106 Mass. 365; *Reddall v. Bryan*, 14 Md. 444; *Gilmer v. Lime Point*, 18 Cal. 229. It is well settled that it may lay aside its sovereignty, and as a petitioner enter the State courts and there accomplish the same end through proceedings authorized by the State Legislature. If the State may delegate its power to a private corporation of another State, for the benefit of a canal located within its borders, as was held by this court in the *Matter of Peter Townsend*, 39 N. Y. 171, so it may to an independent political corporation where the use is public and the convenience shared by its own citizens. *Gilmer v. Lime*

*Point*, 18 Cal. 229; *Burt v. Merchants' Ins. Co.*, 106 Mass. 356. While private property cannot be taken for public purposes without just compensation, this need not be given in all cases concurrently in point of time with the actual exercise of the right of eminent domain. It is enough if an adequate and certain remedy is provided whereby the owner of such property may compel payment of his damages. *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. (N. Y.) 9; *Lyon v. Jerome*, 26 id. 485; *People v. Hayden*, 6 Hill (N. Y.), 359; *Rexford v. Knight*, 11 N. Y. 308. This means reasonable legal certainty. *Chapman v. Yates*, 54 N. Y. 146; *Sage v. City of Brooklyn*, 89 id. 189.

<sup>3</sup> *State v. Jersey City*, 25 N. J. L. 309; *Doughty v. Hope*, 3 Den. (N. Y.) 249; *Adams v. Saratoga, &c. R. R. Co.*, 10 N. Y. 328; *Buffalo, &c. R. R. Co. v. Brainard*, 9 N. Y. 100; *Matter of Kerr*, 42 Barb. (N. Y.) 119; *Beekman v. Saratoga, &c. R. R. Co.*, 3 Paige Ch. (N. Y.) 45; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; *Tide Water Co. v. Archer*, 5 G. & J. (Md.) 479; *New York R. R. Co. v. Young*, 33 Penn. St. 175; *Young v. Buckingham*, 5 Ohio, 485; *North Mo. R. R. Co. v. Gott*, 25 Mo. 540; *Morris Canal Co. v. Townsend*, 24 Barb. (N. Y.) 658; *Vermont Central R. R. Co. v. Baxter*, 22 Vt. 365; *Schmidt v. Dinsmore*, 42 Mo. 225; *Weir v. St. Paul, &c. R. R. Co.*, 18 Minn. 155; *Mayor v. Central R. R.*

ture is the judge of the *necessity* of taking lands for public purposes, but it may in its discretion delegate the exercise of such power. But the determination of the corporation, officers, or persons, to whom the power is delegated, as to whether the use is public or not, is not conclusive; yet where it is a public one, the determination as to the *necessity* of the taking is conclusive upon the courts.<sup>1</sup> The

Co., 58 Ga. 120; *Bonaparte v. Camden R. R. Co.*, Baldw. (U. S. C. C.) 205. The question of delegation and the extent of the power delegated is one of propriety and not of power. *Buffalo R. R. Co. v. Ferris*, 26 Tex. 588; *Boston Water Power Co. v. Boston, &c. R. R. Co.*, 23 Pick. (Mass.) 360; *Brown v. Beatty*, 34 Miss. 227; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446; *Whitman v. Wilmington R. R. Co.*, 2 Harr. (Del.) 514; *Scudder v. Trenton Falls Co.*, 1 N. J. Eq. 694; *People v. Law*, 34 Barb. (N. Y.) 494; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; *Mercer v. Pittsburgh, &c. R. R. Co.*, 36 Penn. St. 99. The right of eminent domain resides in the State, and may be enforced, not only in behalf of the State, but of any artificial person clothed with a franchise the enjoyment of which promotes a public use. The basis of the enforcement of the right is the necessity for the public use of the property the taking of which is sought. *Leisse v. St. Louis, &c. R. R. Co.*, 2 Mo. App. 105. And as the legislature may delegate the exercise of the power of eminent domain to municipal corporations or public boards, the necessity for an appropriation of property by them may not be inquired into by the courts; the legislature is the sole judge of the necessity, if the use to which the property is to be put is public, unless the act otherwise provides. *Matter of Fowler*, 53 N. Y. 60. The right to take private property for a public improvement in the exercise of the right of eminent domain, may be delegated to a corporation acting in its own interests, and for purposes of private gain. And in order to constitute a public use, it is not necessary that the improvement should directly benefit the people of the whole State; the direct public benefit contemplated may be confined to a particular community; and the legislature is, in any case, the sole judge of

what constitutes a public use. *Matter of Bloomfield, &c. Gas-light Co.*, 63 Barb. (N. Y.) 437. An act authorizing a corporation created under the laws of another State to take lands for a public use, is not unconstitutional because the instrumentality employed is a foreign corporation; nor because such corporation derives a pecuniary benefit from the use of lands so taken; nor because such lands are to be used for the maintenance of a navigable canal, which runs along the border of the State, but without its limits. *Matter of Townsend*, 39 N. Y. 171.

<sup>1</sup> CASSODAY, J., in *Smith v. Gould*, Wis. Sup. Ct., 1884; *Matter of Fowler*, 53 N. Y. 60. A railroad is regarded as of public utility; therefore a delegation of the power for the construction of a railroad is proper, as it is not the instrumentalities through which land is taken which lays the foundation of the right to take it, but the *uses* for which it is taken. *Ash v. Cummings*, 50 N. H. 591; *Beekman v. Saratoga R. R. Co.*, 3 Paige Ch. (N. Y.) 45; *Concord R. R. Co. v. Greeley*, 17 N. H. 47; *Kramer v. Cleveland, &c. R. R. Co.*, 5 Ohio St. 40; *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137; *Giesy v. Cincinnati, &c. R. R. Co.*, 4 Ohio St. 308; *Bloomfield, &c. Gas Co. v. Richardson*, 63 Barb. (N. Y.) 437; *Raleigh, &c. R. R. Co. v. Davis*, 4 Dev. & B. (N. C.) 451; *In re City of Buffalo*, 63 N. Y. 167. A general statute authorizing the creation of an indefinite number of railroad corporations, making such corporations common carriers, and requiring them to be constantly engaged in such public employment, may also constitutionally authorize them to take private property for their roads on making compensation. Such property is taken "for public use," within the meaning of the constitutions of New York State and of the United States. *Buffalo & N. Y. R. R.*

power may be delegated to a foreign corporation, and the circumstance that it derives a pecuniary profit therefrom, or that its works are outside the limits of the State, does not render an act conferring the power unconstitutional, if the use is a public one, and beneficial to the people of the State. Thus, a grant of such power to a corporation to take lands to be used for the maintenance of a navigable canal, along, but just outside, the limits of the State, was held a proper exercise of the power.<sup>1</sup> But where such lands were appro-

Co. v. Brainard, 9 N. Y. 100. The legislature cannot, in the exercise of the right of eminent domain provide for the appropriation of private property to a mere private enterprise, in which the public have manifestly no interest. But railroad companies, when owned by individuals, are not private enterprises merely, and the legislature may authorize such incorporations to take the necessary private property to the use of their roads *in invitum*. Brown v. Beatty, 34 Miss. 227. Although the government has no authority, under the right of eminent domain, to take the property of one citizen and transfer it to another, even for a full compensation, if the public interest will not be promoted by such transfer, yet the legislature is the sole judge as to the expediency of making police regulations interfering with the natural rights of the citizens of the State; and also as to the expediency of exercising the right of eminent domain for the purpose of making public improvements. Varick v. Smith, 5 Paige Ch. (N. Y.) 137. Mount Washington Road Co., 35 N. H. 134. A statute which authorizes the taking a whole lot, where a part only is needed, is unconstitutional and void, in so far as it assumes to authorize the taking of more than is needed, without the owner's consent. Matter of Albany Street, 11 Wend. (N. Y.) 149. And see Embury v. Conner, 3 N. Y. 511. In England it is held that upon questions between railway companies and individuals whose property the former seek to take under compulsory clauses in their acts, the court will not strain the construction of the act in favor of the companies. Gray v. Liverpool & Bury Ry. Co., 9 Beav. 391. On the contrary, the powers given to railway com-

panies to make compulsory purchases of land are to be construed strictly. Webb v. Manchester & Leeds Ry. Co., 4 Myl. & C. 116. It is, however, held that when a company are authorized by their act of incorporation to enter upon and appropriate such lands, buildings, &c., as may be proper to accomplish the objects of their creation, the corporation must be regarded as the proper judges of what lands are necessary for their works. Richards v. Scarborough Public Market Co., 23 Law J. N. s. 110. And although corporations are not to be allowed to act capriciously in regard to the execution of the powers conferred by the act of incorporation, they are the judges of the most feasible mode of carrying forward their own operations, and are not liable to be called to account for the exercise of this discretion, so long as they act *bonâ fide*, and with common prudence. London & Birmingham Ry. Co. v. Grand Junction Canal Co., 1 Eng. Ry. Cas. 224; Priestley v. Manchester & Leeds Ry. Co., 2 Eng. Ry. Cas. 134. Each of the proprietors through whose lands a public work is constructed has a right to have the power strictly carried into effect, as regards his own lands, and to require that no variation shall be made to his prejudice; but where the act is faithfully carried into execution as regards his lands, he cannot, on the mere ground of a variation which is not injurious to himself, and which was made with the consent of others, obtain from a court of equity an injunction to stay the proceedings. Lee v. Milner, 2 Y. & C. 611; Lee v. Milner, 2 M. & W. 824.

<sup>1</sup> Matter of Townsend, 39 N. Y. 171; Baltimore, &c. R. R. Co. v. Harris, 12 Wall. (U. S.) 65; Southwestern R. R. Co. v. Southern, &c. Tel. Co., 46 Ga. 43;

propriated without authority, or have been injured by the construction of such canal, and a reservoir of water therefor, by flooding, etc., a statute which authorizes the appointment of commissioners to appraise the damages already sustained, and which makes their award and the payment or tender of the sum awarded a bar to any action to recover damages for such injury, is unconstitutional. The cause of action of the owner of such lands for his damages is one to which the right of trial by jury, "in all cases in which it has been heretofore used," as guaranteed by the Constitution, is especially appropriate, and he cannot constitutionally be required, by retroactive legislation, to submit his cause to a tribunal not proceeding according to the course of the common law.<sup>1</sup>

Statutes delegating the right of eminent domain to railroad and other corporations for public use, being in derogation of common right, are not to be extended by implication, and must be strictly complied with. They are not to be construed so literally as to defeat the evident purposes of the legislature, but the powers granted will extend no farther than is expressly stated in the act, or than is necessary to accomplish its general scope and purpose. If there remains a doubt as to the extent of the power, after all reasonable intendments in its favor, the doubt will be solved adversely to the claim of power. And the proper limit to the power is the reasonable necessity of the corporation in the discharge of its duty to the public.<sup>2</sup> A corporation can exercise a delegated power to take

*Black v. Delaware, &c. Canal Co.*, 22 N. J. Eq. 130; *Gilmer v. Lime Point*, 18 Cal. 229; *New York, &c. R. R. Co. v. Young*, 33 Penn. St. 175. But the power is not extended to foreign corporations by implication. *Holbert v. St. Louis, &c. R. R. Co.*, 45 Iowa, 23.

<sup>1</sup> *Matter of Townsend*, *ante*.

<sup>2</sup> *New York, &c. R. R. Co. v. Kip*, 46 N. Y. 546; *Oregonian R. R. Co. v. Hill*, 9 Oregon, 377; *Southern Pacific R. R. Co. v. Wilson*, 49 Cal. 396; *Mississippi Bridge Co. v. Ring*, 58 Mo. 491; *Webb v. Manchester, &c. Ry. Co.*, 1 Eng. Ry. Canal Cas. 576. A statute authorizing the taking of private property against the owner's consent must be strictly construed; and while the property and the estate to be taken, whether an easement or a fee, and the purpose to which it is to be applied, may be designated in the statute, it

must be by unequivocal words. An act providing for a supply of water in the village of Amsterdam (ch. 101, L. 1881, as amended by ch. 197, L. of 1882) authorized and required the taking of a fee in the lands required for the purposes of the act. *DANFORTH, J.*, said: "As the commissioners in this case might purchase, so no doubt the legislature might empower them to take by eminent domain, a right to enjoy a privilege in or out of the owner's estate which would not give them a right to enjoy the estate itself by exclusive or permanent occupation. Such a right, however acquired, would be an easement; and as no grant is pretended, the question before us concerns the proper construction of the statute, — *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, — and the petition upon which the commissioners have undertaken to proceed. The act itself, in-

private property for public use only so far as the statute delegating such power plainly confers it. Thus, where the charter of a city

asmuch as it authorizes the taking of private property against the owner's consent, is to be strictly construed. *Sweet v. Buffalo, N. Y. & Phila. R. R. Co.*, 79 N. Y. 293; *Adams v. S. & W. R. R. Co.*, 10 id. 328. And while the property and the estate which is to be taken, whether an easement or fee, and the purpose to which it is to be applied may be designated in the statute, — *People v. Smith*, 21 N. Y. 595; *Sweet v. Buffalo R. R. Co.*, *supra*; *Brooklyn Park Com'rs v. Armstrong, supra*, — it must be by unequivocal words, and in pursuing it, all prescribed requirements must be strictly observed. *Matter of N. Y. C. & H. R. R. Co.*, *supra*; *Matter of Application of City of Buffalo*, 78 N. Y. 362; *Matter of Com'rs of Washington Park*, 52 id. 181. The owner may, if the legislature so declares, be divested of the fee, although the public use is special, and not of necessity perpetual. *Sweet v. Buffalo R. R. Co.*, *supra*. On the other hand, the entire estate need not be taken, but only that interest which is necessary to accomplish the prescribed purpose. 72 N. Y. 330. See also *People v. Haines*, 49 N. Y. 587; *Matter of New York, &c. R. R. Co.*, 70 id. 191." *Matter of Water Com'rs of Amsterdam*, New York Court of Appeals, 1884 (not yet reported). A special authority to take lands against the consent of the owner must be strictly pursued, and must appear to be so on the face of the order. Thus, where a particular notice in writing is prescribed by the act, it is not sufficient to say, "upon proof of due notice having been given," but it should appear on the order what notice was given. *Van Wickle v. Camden & Amboy R. R. Co.*, 3 N. J. Eq. 162. The charter of a railroad company contained the provision that in all cases where any person through whose land the road may run should refuse to relinquish the same, or where a contract between the parties could not be made, it should be lawful for the corporation to give notice to a justice of the peace, etc., who should thereupon summon the owner to appear, and appoint twelve disinterested men, who, on oath, should view the premises, and taking into

consideration the advantage and disadvantage caused to the same by building the road, assess the damage, etc. It was held that the act was against common right, and must be strictly construed, and that to entitle the company to the benefit of its provisions, they must have taken the initiative in assessing the damages; that the act only applied to a case where the land appropriated was part of a tract with which the road came in contact; and if the road was not in such contact at the time the assessment was made, the fact that, under the original laying out, it had been, was of no importance. *Edward v. Lawrenceburg & Upper Mississippi R. R. Co.*, 7 Ind. 711. The power of the legislature to authorize the building of a railroad on a street or other public highway may be devolved at discretion upon the local authorities. *Mercer v. Pittsburgh, &c. R. R. Co.*, 36 Penn. St. 99. Private corporations may be authorized to take private property for the use of the corporation, *where the object of the incorporation is the public benefit, as in the case of railroads, canals, etc.* *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694. So a private corporation, created for the purpose of making a road open to public travel upon payment of a fixed toll, may be authorized by the legislature to take land for the road without the owner's consent, upon payment of a just compensation, to be determined in some reasonable and convenient method. The fact that the members have a pecuniary interest, such as will give it in law the character of a private corporation, will not prevent the State from using it to accomplish a public object. *Petition of Mount Washington Road Co.*, 35 N. H. 134. It is established by the uniform current of decisions, that the property of individuals, taken by railroad companies and similar corporations under their charters, is, from the public benefits resulting therefrom, to be deemed to be taken for public use within the constitutional provision upon that subject. *Bradley v. The New York & New Haven R. R. Co.*, 21 Conn. 294. And the power of govern-



confers authority upon the city to "take private property for opening, altering, and laying out any street, lane, avenue, alley, public square, or other public grounds," it was held that such delegated authority does not confer power to condemn property on which to erect a city prison.<sup>1</sup>

*Prima facie*, the discretion exercised by a railway corporation in selecting land for its purposes is good and binding,<sup>2</sup> and will not be revised by the courts unless it clearly appears that they have exceeded their powers or acted in bad faith.<sup>3</sup> The circumstance that another location would do less damage will not justify the court in attempting to control the discretion.<sup>4</sup> If the route is not defined in the charter, it may take the most feasible route, and may avoid natural obstacles, although the route taken to avoid them is less direct;<sup>5</sup> nor can the court compel it to take a fee in the land when it has elected to take only an easement.<sup>6</sup> A *de facto* corporation may exercise the power, and the regularity of the proceedings cannot be questioned.<sup>7</sup> But there must be a sufficient conformity to the law to create and maintain corporate existence.<sup>8</sup> The power is conferred as a personal trust, and cannot be delegated or assigned; consequently neither a lessee of a railroad<sup>9</sup> nor a person employed to build it<sup>10</sup> can, without express authority, exercise the right. The power is presumed to exist only when required by public necessity; and while such statutes, being in derogation of private rights are to be construed strictly, and are not to be extended beyond their fair import, yet they are to

ment to delegate the exercise of the eminent domain to effectuate such purpose, from the universality of its exercise, is no longer an open question. *Swan v. Williams*, 2 Mich. 427.

<sup>1</sup> *East St. Louis v. St. John*, 47 Ill. 463.

<sup>2</sup> *Virginia R. R. Co. v. Elliott*, 5 Nev. 358; *Cotton v. Boom Co.*, 22 Min. 372.

<sup>3</sup> *South Carolina R. R. Co. v. Blake*, 9 Rich. (S. C.) L. 228; *Fall River Iron Works v. Old Colony R. R. Co.*, 5 Allen (Mass.), 221; *Collins v. Creecy*, 8 Jones (N. C.) L. 333; *Hentz v. Long Island R. R. Co.*, 13 Barb. (N. Y.) 646; *Ex parte Manhattan Co.*, 22 Wend. (N. Y.) 653; *Parke's Appeal*, 64 Penn. St. 137; *Supervisors v. Gorrell*, 20 Gratt. (Va.) 484.

<sup>4</sup> *New York R. R. Co. v. Young*, 38 Penn. St. 175.

<sup>5</sup> *Hentz v. Long Island R. R. Co.*, 13

Barb. (N. Y.) 646; *South Minnesota R. R. Co. v. Stoddard*, 6 Minn. 150.

<sup>6</sup> *Charleston R. R. Co. v. Blake*, *ante*.

<sup>7</sup> *Oregon Cascade Co. v. Bailey*, 3 Oregon, 64; *Cincinnati, &c. R. R. Co. v. Danville, &c. R. R. Co.*, 75 Ill. 113; *McAuley v. Columbus, &c. R. R. Co.*, 83 Ill. 348; *Reisen v. Strong*, 24 Kan. 410; *National Docks R. R. Co. v. Central R. R. Co.*, 33 N. J. L. But see *Atlantic, &c. R. R. Co. v. Sullivan*, 5 Ohio St. 276; *Atkinson v. Marietta, &c. R. R. Co.*, where it was held that proof of due and legal organization must exist as a condition precedent to the exercise of the power.

<sup>8</sup> *Atlantic, &c. R. R. Co. v. Sullivan, ante*; *Powers v. Hazleton*, 33 Ohio St. 429.

<sup>9</sup> *Worcester v. Norwich, &c. R. R. Co.*, 109 Mass. 103.

<sup>10</sup> *St. Peter v. Denison*, 58 N. Y. 416.

be construed reasonably, and so as to effectuate the evident intention of the legislature in conferring the power.<sup>1</sup> In order to warrant the exercise of the power, there must be both a necessity and a public use,<sup>2</sup> but the necessity need not be made certain before it is lawful to proceed with the condemnation.<sup>3</sup> The company is not confined exclusively to lands which are necessary, but it may also take lands which are *convenient* to its use,<sup>4</sup> and those which may be required when its business is more extended.<sup>5</sup>

The *necessity* of taking the land, is *prima facie* a question for the corporation to determine,<sup>6</sup> and on an application for the appointment of commissioners to estimate the damages on a condemnation of land for railway uses, the only inquiry that, as a general rule, will be made is, whether the applicant has a *prima facie* right. In this summary proceeding contestable questions will not be decided.<sup>7</sup> Thus, in a proceeding by a railway company before a probate judge, under the statute then existing it was held incompetent for the landowner to prove, for the purpose of defeating the proceeding, that the corporators procured the incorporation of the company, not for a public use, but for their private purpose merely, and were exercising the corporate privileges in abuse of the law; nor was it competent to prove for that purpose that there was no necessity for the road. These questions were not committed by the law to the determination of the probate judge, or of the jury, but pertained to other proceedings.<sup>8</sup> Courts have the right to determine whether the use is public in its nature or not; but when the use is public, the judiciary cannot inquire into the necessity or propriety of exercising the right of eminent domain; that right is political in its nature, and to deter-

<sup>1</sup> Rensselaer & Saratoga R. R. Co. v. Davis, 43 N. Y. 137; Boston & Lowell R. R. Co. v. Salem, &c. R. R. Co., 2 Gray (Mass.), 1; Prather v. Jeffersonville, &c. R. R. Co., 52 Md. 16; Glover v. Boston, 14 Gray (Mass.), 282; Wilson v. Lynn, 119 Mass. 174; Thacher v. Dartmouth Bridge Co., 18 Pick. (Mass.) 501; New York, &c. R. R. Co. v. Kip, 46 N. Y. 546; Currier v. Marietta, &c. R. R. Co., 11 Ohio St. 228; New York, &c. R. R. v. Gunnison, 1 Hun (N. Y.), 496; Miami Coal Co. v. Wighton, 19 Ohio St. 560.

<sup>2</sup> Tracy v. Elizabethtown, &c. R. R. Co., 80 Ky. 259.

<sup>3</sup> Chicago, &c. R. R. Co. v. Dunbar,

100 Ill. 110; Bowman v. Venice, &c. R. R. Co., 102 id. 459.

<sup>4</sup> Ladd v. Maldon, &c. Ry. Co., 6 Exchq. 143.

<sup>5</sup> Lodge v. Philadelphia, &c. R. R. Co., 8 Phila. (Penn.) 345.

<sup>6</sup> Dietrichs v. Lincoln, &c. R. R. Co., 13 Neb. 361. If, however, the statute refers the question to the commissioners or other tribunal, their decision upon that question is necessary. Shick v. Pennsylvania R. R. Co., 1 Pearson (Penn.), 259. See also Doe v. North Staffordshire Ry. Co., 16 Q. B. 526.

<sup>7</sup> State v. Hudson Tunnel R. R. Co., 38 N. J. L. 17.

<sup>8</sup> Powers v. Hazleton, 33 Ohio St. 429.

mine when it shall be exercised belongs exclusively to the legislative branch of the government.<sup>1</sup> When the use is public, and the legislature has acted upon the question, the expediency or necessity of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested.<sup>2</sup> The right lies dormant in the State until legislative action points out the occasions, the modes, the conditions and the agencies for its appropriation; and a legislative act, being the customary mode of determining that fact, must be held for this purpose the law of the land; and no further finding or adjudication is essential, unless it is required expressly by the constitution of the State.<sup>3</sup>

SEC. 225. **Quantity of Land to be taken.** — Where neither the charter nor general law restricts a railroad company as to the quantity of land to be taken for its roadway and general uses, it is restricted to such a quantity as is reasonably necessary; it is, in a modified degree, permitted to judge for itself as to the amount that is necessary for such purpose. This right is subject to all constitutional and statutory restrictions, and to the further limitation that the courts are clothed with ample power to prevent any abuse of the same.<sup>4</sup> In a Wisconsin case<sup>5</sup> the defendant's charter authorized it to take any land along and including the line of its road, not exceeding two hundred feet in width, and any land beyond those limits "which the directors shall, by resolution adopted by them, declare to be necessary for the use of said company," etc. It was held that this provision of the charter must be strictly complied with, before the company can condemn land outside the limit of two hundred feet in width; that the resolution provided for is a corporate act, and must be adopted at a meeting of the directors at which there is present a

<sup>1</sup> *Chicago, Rock Island & Pacific R. R. Co. v. Town of Lake*, 71 Ill. 333.

<sup>2</sup> *Baltimore & Ohio R. R. Co. v. Pittsburgh, Wheeling, & Ky. R. R. Co.*, 17 West Va. 812.

<sup>3</sup> *Alexandria & Fredericksburg R. R. Co. v. Alexandria & Washington R. R. Co.*, 75 Va. 780.

<sup>4</sup> *Smith v. Chicago & Western Indiana R. R. Co.*, 105 Ill. 511. A railway company will be restrained from taking more

land than is necessary for the purpose for which the taking is authorized. *Webb v. Manchester & Leeds R. R. Co.*, 4 M. & Cr. 116.

<sup>5</sup> *Stringham v. Oshkosh, &c. R. R. Co.*, 33 Wis. 471. See also *Johnston v. Chicago, Milwaukee, &c. R. R. Co.*, 58 Iowa, 537, where it was held that where the company was thus restricted it could not condemn additional lands for stations, etc.

quorum competent to do business ; and generally, if the statute points out the mode in which the quantity of land necessary is to be determined, such mode must be adopted. Thus, under an act incorporating the Carolina Central Railroad Company, and providing for the condemnation of land for the construction and operation of the road, it was made the duty of the commissioners appointed by the court not only to ascertain the value, but also the quantity, of the land which it was necessary to appropriate ; and it was held that the land-owner did not waive his right to insist on the performance of this duty by failing to answer the allegations of the petitioner as to the quantity necessary.<sup>1</sup>

In ascertaining the amount of land necessary, the court will accept the evidence of the engineer in the service of the company as conclusive, if the statement has a reasonable appearance of accuracy.<sup>2</sup> If the statute restricts the company to a roadway of a certain width, but gives the court authority to permit it to condemn more if necessary, the burden of establishing the necessity for taking more is upon the company.<sup>3</sup> And if the statute designates the species of necessity which must exist in order to warrant the taking of more, — as, first, on account of wood and water stations, and second, where a greater width is required for excavation, embankment, or depositing waste earth, — it cannot be permitted to increase the width of its roadway upon any other grounds.<sup>4</sup> If, however, the right of way is not limited to any particular width, it may vary in different localities according to its necessities for the convenient and economical management of its business.<sup>5</sup>

The right of running sidings to private establishments, and of taking the necessary land for the purpose, is clearly within the constitutional power of the legislature to confer, because the public interest is thereby subserved, by reason of the increased facilities afforded for developing the resources of the State, and promoting the general wealth and prosperity of the community.<sup>6</sup> Where a railway company had a side track for many years before, connecting its main

<sup>1</sup> *Carolina Central R. R. Co. v. Love*, 81 N. C. 434.

<sup>2</sup> *Kemp v. South-Eastern Ry. Co.*, L. R. 7 Ch. 364.

<sup>3</sup> *Wisconsin Central R. R. Co. v. Cornell University*, 52 Wis. 537 ; *Jefferson & Ponchartrain, &c. R. R. Co. v. Hazem*, 7 La. An. 182. The fact that it has constructed its road in accordance with the maps and

surveys filed does not prevent it from taking more land if necessary. *Virginia & Tomkee R. R. Co. v. Lovejoy*, 8 Nev. 100.

<sup>4</sup> *Jackson v. Chicago, &c. R. R. Co.*, 58 Iowa, 537.

<sup>5</sup> *Chicago, Rock Island, &c. R. R. Co. v. People*, 4 Bradw. (Ill.) 468.

<sup>6</sup> *Getz's Appeal*, 3 Amer. & Eng. R. R. Cas. (Penn.) 186.

track with a public warehouse and elevator in a town, over the land of another, but without having the right of way therefor except by the mere consent or license of the owner, it was held that the company had the right to institute proceedings to condemn the land over which such branch ran, for right of way.<sup>1</sup>

One railway company cannot, by agreement, condemn property for its own use and the use of other companies. Each company must proceed for itself.<sup>2</sup> But while a railway company may not have the legal authority to condemn a right of way for a lateral line, yet it may cause another company of its own stockholders to be organized so as to have that power; and when such subsidiary company has condemned the right of way, it may lease its line to the former company; and in this there will be no fraud upon those whose lands have been condemned.<sup>3</sup>

**SEC. 226. Public use, What is: How determined.**—As we have seen, the right of eminent domain can only be exercised for a public use. To constitute a public use authorizing the exercise of the right of eminent domain, it is not required that the entire community, or even a considerable portion of it, should directly participate in the benefits to be derived from the property taken.<sup>4</sup> The clause in the Constitution prohibiting the taking of private property for public uses without compensation does not prohibit the legislature from authorizing an exclusive occupation of private property, temporarily, as an incipient proceeding to the acquisition of a title to, or an easement in the land taken.<sup>5</sup> The mode and manner in which the owner of land taken for public use is to be compensated for the land so taken, are to be determined by the legislature. When it is not required that compensation be made before entering upon the land taken, and it is provided that the owner of the land may cause his damages to be ascertained in

<sup>1</sup> *Fisher v. Chicago & Springfield R. R. Co.*, 104 Ill. 323.

<sup>2</sup> *Swinney v. Fort Wayne, Muncie, & Cincinnati R. R. Co.*, 59 Ind. 205.

<sup>3</sup> *Lower v. Chicago, Burlington, & Quincy R. R. Co.*, 59 Ia. 563. To the petition of a railway company to take lands, the owner answered asking an injunction upon the alleged grounds that the plaintiff had no valid organization, did not intend to build the proposed line, and had organized simply in the interest of another company, which grounds were being

tested in a *quo warranto* proceeding then pending against such company. It was held that the answer was insufficient. *Aurora & Cincinnati R. R. Co. v. Miller*, 56 Ind. 88.

<sup>4</sup> *Talbot v. Hudson*, 16 Gray (Mass.), 417; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Holt v. Somerville*, 127 Mass. 408; *Bancroft v. Cambridge*, 126 id. 438; *Denham v. County Comm'rs*, 108 Mass. 202; *Gilmer v. Lime Point*, 18 Cal. 229.

<sup>5</sup> *Cushman v. Smith*, 34 Me. 247.

the same manner as in the case of land taken for highways, such owner cannot maintain trespass for such taking, within the time limited for an assessment of damages, and without any application for such assessment.<sup>1</sup>

It is not necessary for us to state what uses have been regarded as public, within the meaning of the term as employed in the Constitution; it is sufficient for our purposes that railways have always been regarded as such public improvements as to justify the legislature in conferring upon corporations established for their construction and operation, this prerogative privilege.<sup>2</sup> The circumstance,

<sup>1</sup> *Cushman v. Smith*, 34 Me. 247; *Nichols v. Som. & Ken. R. R. Co.*, 43 id. 356; *Davis v. Russell*, 47 id. 443; *Cairo & Fulton R. R. Co. v. Turner*, 31 Ark. 494; 25 Am. Rep. 564. *Riche v. Bar Harbor Water Co.*, 72 Me. 148.

<sup>2</sup> *San Francisco, &c. R. R. Co. v. Caldwell*, 31 Cal. 367; *New York & Harlem R. R. Co. v. Kip*, 46 N. Y. 546; *Secombe v. Milwaukee, &c. R. R. Co.*, 23 Wall. (U. S.) 108; *Newby v. Platte & Co.*, 25 Mo. 258; *Walther v. Warner*, 25 id. 277; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507; *O'Hara v. Lexington, &c. R. R. Co.* 1 Dana (Ky.), 232; *Arnold v. Covington Bridge*, 1 Duv. (Ky.) 372; *Buffalo R. R. Co. v. Ferris*, 26 Tex. 588; *Swan v. Williams*, 2 Mich. 427; *Raleigh R. R. Co. v. Davis*, 2 D. & B. (N. C.) 451; *Brown v. Beatty*, 34 Miss. 227; *Pine Grove v. Talcott*, 19 Wall. (U. S.) 666. Acts authorizing railroad companies to take private property for the purposes of the road, upon the payment of a fair compensation, are constitutional, and the mode of ascertaining the damages of the owners of the land taken for the road, by commissioners appointed by the legislature or the governor, is not repugnant to the Constitution. The provision of a State constitution which declares that the right of the trial by jury in all cases in which it has heretofore been used shall remain inviolate forever, relates to the trials of issues of fact in civil and criminal cases in courts of justice. The right of eminent domain remains in the government, or in the aggregate body of the people in their sovereign capacity; and they can resume the possession of private property, not only

where the safety, but also where the interest or even the convenience of the State is concerned; as where the land is wanted for a road, canal, or other public improvement. The only restriction upon the power of the people to resume the possession of property for the purpose of an internal improvement in which the public, or the inhabitants of any particular section of the State, as citizens merely, have an interest, is that the property cannot be taken for such public use without just compensation to the owner, and in the mode prescribed by law. It belongs to the legislature to determine whether the benefit to the public from such improvement is of sufficient importance to justify their exercise of the right of eminent domain, in thus interfering with the private rights of individuals. In cases of public improvements, from which a benefit would result to the public, this right of eminent domain may be exercised either directly by the agents of the government, or through the medium of corporate bodies, or by means of individual enterprise. Railroads are public improvements, from which the public derive a benefit; and the legislature can appropriate the private property of an individual for the purpose of such improvements, or may authorize an individual or a corporation thus to appropriate it, upon paying a just compensation to the owner for the same. The privilege of making a railroad and taking tolls thereon, when granted to an individual or a company, is a franchise. The public have an interest in the use of the road, and the owners of the franchise are liable to respond in damages, if they

that they are built, owned, and operated by a private corporation, and that but comparatively few people are benefited thereby, does

refuse to transport an individual or his property upon such road, without any reasonable excuse, upon being paid the usual rate of fare. The legislature may regulate the use of the franchise and limit the amount of the tolls, unless they have deprived themselves of that power by a legislative contract with the owners of the road. The sovereign power has no right to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will not be promoted thereby. *Beekman v. Saratoga, &c. R. R. Co.*, 3 Paige (N. Y.) Ch. 45. That a railroad is in general such a public use as affords just ground for the taking of private property and appropriating it to that use, see *Concord R. R. Co. v. Greely*, 17 N. H. 47; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 324; *Louisville, Cincinnati, & Charleston R. R. Co. v. Chappell, Rice* (So. Car.), 383; *Baltimore & Ohio R. R. Co. v. Van Ness*, 4 Cranch (U. S. C. C.), 595; *Alldridge v. Tusculum*, Courtland, & Decatur R. R. Co., 2 S. & P. (Ala.) 199; *Beekman v. Saratoga & Schenectady R. R. Co.*, 3 Paige (N. Y.) Ch. 45; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 14 Wend. (N. Y.) 52, also 18 id. 9; *Buffalo & New York R. R. Co. v. Brainard*, 9 N. Y. 100; *Weir v. St. Paul, Stillwater, &c. R. R. Co.*, 18 Minn. 155; *Whiteman v. Wilmington & Susquehanna R. R. Co.*, 2 Harr. (Del.) 514; *Bradley v. New York & New Haven R. R. Co.*, 21 Conn. 294; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 Baldw. (U. S. C. C.) 205. The taking of land for a ditch to drain a public highway is a taking for public use, and eminent domain proceedings can be instituted therefor. In *Norton v. Peck*, 3 Wis. 728, *WHITON, C. J.*, said: "There can be no doubt that land taken and used for a common highway is taken for a public use. The proposition we deem so clear that no argument is required to prove it." The mere fact that the land taken for the drain in question was outside of the limits of the highway sought to be improved did not prevent its being taken for a public use, if such was the result of the taking. The right to obtain materials outside of the limits of the highway, to construct or

repair the same, upon making compensation, we apprehend would not be questioned on the ground that it was not for a public use. There can be no essential difference in principle from going outside to obtain such material to be used upon the highway, and going outside to construct drains to draw water from the highway. The distance from the highway to the place where the lands of the plaintiffs were excavated may raise a doubt as to the necessity of such entry; but as indicated, the right to so take is by the statute made dependent upon the necessity. The question recurs, however, — is the necessity to be determined by the court or the legislature, and if the latter, then may they delegate such right to the town supervisors or overseer of highways? In *Pittsburgh v. Scott*, 1 Penn. St. 314, it was observed by the court "that the right of eminent domain or inherent sovereign power gives the legislature the control of private property for public use. . . . As a general rule it rests in the wisdom of the legislature to determine what is a public use, and also the necessity of taking the property of an individual for that purpose. . . . The right of eminent domain, as has been repeatedly held, may be exercised by the government through its immediate officers or agents, or indirectly through the medium of corporate bodies or private individuals." It is there in effect conceded, however, that courts may interfere where it clearly appears that the right has been abused by the legislature in authorizing the taking for a private use instead of a public use. In *Talbot v. Hudson*, 16 Gray (Mass.), 407, it was held that "the determination of the legislature is not conclusive that a purpose for which it directs private property to be taken is a public use, but is conclusive, if the use is public, that a necessity exists which requires the property to be taken. In *Williams v. School District*, 33 Vt. 271, it was held, in effect that the taking of land for a school-house was for a public use, and that the quantity of land allowed to be taken was not limited to the mere site of the school-house, but included such adjacent land for the purpose of a yard, etc., as the

not deprive them of their public character.<sup>1</sup> To be public, the user must concern the public, but it is not at all essential that all should be benefited thereby;<sup>2</sup> nor that the public should own the property, or have any pecuniary interest therein. The question is, whether it is of so much benefit or advantage to the community, either directly or indirectly, that it cannot be said to be wholly private in its effect and operation.<sup>3</sup> Thus, under general railroad laws, land may

selectmen or commissioners might think requisite. As to the necessity of such taking, it was there said by POLAND, J., for the court, "that where the use is a public one, it rests wholly with the legislature to say whether sufficient necessity exists to justify granting the power to take private property therefor, and that courts will not interfere with their discretion, at least, not unless the entire absence of any necessity is shown." In *Beekman v. Saratoga R. R. Co.*, 3 Paige (N. Y.) Ch. 73, Chancellor WALWORTH said: "But if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit of the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose." See *Matter of Ryers*, 72 N. Y. 8, under a similar act. If the owner of land taken can by a method provided by statute resort to taxable property of a town for damages sustained, he receives compensation within the meaning of the Constitution. It has been frequently held in New York, in effect, that where an individual's land is taken for a public highway, such individual obtains the just compensation to which he is entitled, on being provided with a sure and legal remedy for its collection; and that it is not essential that the amount of such compensation should be actually paid or ascertained before the land is taken or appropriated. *Chapman v. Gates*, 54 N. Y. 143. The same rule has been sanctioned in other States. *Pittsburgh v. Scott*; *Mercer v. McWilliams*, 1 Wright (Ohio), 132; *Shearers v. Commissioners*, 13 Kan. 145; *Jackson v. Main*, 4 Litt. (Ky.) 322; *Smeaton v. Martin*, 57 Wis. 364.

<sup>1</sup> *Talbot v. Hudson*, 16 Gray (Mass.),

417; *Gilmer v. Lime Point*, 18 Cal. 229. The right of eminent domain has been exercised in favor of grist mills, *Olmstead v. Camp*, 33 Conn. 532; and mills generally, *Tyler v. Beacher*, 44 Vt. 648; *Boston Mill Dam v. Newman*, 12 Pick. (Mass.) 467; the draining of marshes, *Henry v. Thomas*, 119 Mass. 583; *Willson v. Blackbird Creek Marsh*, 2 Pet. (U. S.) 245; the erection of school-houses, *Township Board v. Hackman*, 48 Mo. 243; *Peckham v. School Dist.*, 7 R. I. 545; burying grounds, *Edgecombe v. Burlington*, 46 Vt. 214; *Edwards v. Stonington Cemetery*, 20 Conn. 466; public parks, *Higginson v. Nahant*, 11 Allen (Mass.), 520; reservoirs, *Kane v. Baltimore*, 15 Md. 240; *Thorn v. Sweeney*, 12 Nev. 251; and a multitude of uses which were not contemplated when the Constitution was framed, but which, by reason of the benefits flowing from them, come within the power therein given. *Pattinson v. Boom Co.*, 3 Dill. (U. S. C. C.) 465; *N. O. Tel. Co. v. Southern Tel. Co.*, 53 Ala. 211; *Memphis Freight Co. v. Memphis*, 4 Cold. (Tenn.) 419; *Finney v. Somerville*, 80 Penn. St. 59; *Cotton v. Boom Co.*, 22 Minn. 372; *Orr v. Quimby*, 54 N. H. 590; *Clarke v. Blackmer*, 44 N. Y. 150; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Tipton v. Miller*, 3 Yerg. (Tenn.) 423; *Dayton Mining Co. v. Seawell*, 11 Nev. 394; *Bankhead v. Brown*, 25 Iowa, 540.

<sup>2</sup> *Gilmer v. Lime Point*, *ante*; *Sherman v. Buick*, 32 id. 241; *Warren v. Bunnell*, 11 Vt. 600; *Shaver v. Starett*, 4 Ohio St. 404; *Killbuck v. Private Road*, 77 Penn. St. 39; *Sadler v. Langham*, 34 Ala. 311.

<sup>3</sup> *Olmstead v. Camp*, 33 Conn. 532. In *State v. American, &c. Tel. Co.*, 43 N. J. L. 381, it was held that the supplement of 1880 to the act in relation to telegraph companies, authorizing the condemnation of the right of way, is constitutional. The



be taken by a railway company for the construction of side tracks, and branches to mines,<sup>1</sup> mills, manufacturing establishments, or to its own workshops, coal-sheds, engine-houses, stock-yards, elevators, etc.;<sup>2</sup> and it is no objection to the exercise of such right that the land so taken constitutes a private way, as it is not the special use made of the land taken which characterizes it, *but its convenient necessity to that part which is for public use.*<sup>3</sup> Therefore turn-outs, depots, side tracks, turn-tables, etc., being necessary conveniences in conducting the business of a railroad, are included under the word "appendages" in an act authorizing the taking of lands for the construction of a railroad with such "appendages" as may be necessary.<sup>4</sup> But under the power of an incorporated railway company to condemn land necessary for side tracks, turn-outs, or switches, it has no right to take land for the construction of an independent branch road to subserve only mere private interests. But it is no valid objection to the condemnation of a strip of land for a switch or a side track of a railway corporation, that the proposed track may serve private use, if in addition to serving such use it is also necessary for the successful and convenient operations of the main line of the railroad. Where a railway corporation is limited by the authorities of an incorporated village or town to thirty feet in the centre of a public street in which to locate its main track, and it becomes necessary to construct a switch or side track, it is no objection to the condemnation of land for that purpose that it runs perpendicular to

use contemplated by the supplement is a public and not a private use. *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Scudder v. Delaware Falls Co.*, Saxe, 729. The term "public use" is flexible, and cannot be confined to public use known at the time of framing the Constitution. *All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain.* Any use which will satisfy a reasonable public demand for facilities of travel, for transmission of intelligence or of commodities, would be a public use. *Concord R. R. Co. v. Greely*, 17 N. H. 47; *New Orleans Tel. Co. v. Southern Tel. Co.*, 53 Ala. 211. Companies in accepting the benefits of this law, lay themselves under obligation to the public to permit the use of their lines by all persons, under reasonable regulations. This obligation upon a company

need not be imposed in express words; it may rest upon implication.

<sup>1</sup> *Harvey v. Thomas*, 10 Watts (Penn.), 63. But in Pennsylvania and Maryland, there are special statutes authorizing the construction of branch roads to mines, etc. *Harvey v. Lloyd*, 3 Penn. St. 331; *Shoenberger v. Mullhollan*, 8 id. 134; *Northern Central Coal Co. v. Coal & Iron Co.*, 37 Md. 537. But in the absence of statutes conferring such right, it could not be exercised. Such branches are not such incidents of the trunk line that they can be built under the charter for a main line.

<sup>2</sup> *Philadelphia, &c. R. R. Co. v. Williams*, 54 Penn. St. 103.

<sup>3</sup> *Ladd v. Maldon, &c. Ry. Co.*, 20 L. J. N. S. 102.

<sup>4</sup> *Hannibal, &c. R. R. Co. v. Muder*, 49 Mo. 165.

the main track, there not being room enough in the right of way along the street for the side track in addition to its two main tracks. To deny a petition of a railway company for the condemnation of land for a side track, it should appear that the object thereby sought is clearly an abuse of power, and a taking of private property for an object not required for the convenient operation of the road.<sup>1</sup>

The running of a side track by a railroad company to a private manufacturing establishment to connect the business of such establishment with the main line of the railroad is a public use for which land may be appropriated. These establishments are very numerous, especially in Pennsylvania, along and near lines of railroad. They serve to develop the resources of the State, they give employment to vast numbers of citizens, and constitute a most important element in the general wealth and prosperity of the community. Convenience and consequent cheapness of transportation are in most cases essential, and in many vital to their maintenance. Moreover, considerable portions of the general public are directly interested in the traffic which goes to them, and in that which comes from them. Hence they cannot be regarded as merely private interests, and therefore without the pale of that public use for which private property may be taken in the construction of railroads lawfully established and actually used for public purposes.<sup>2</sup>

<sup>1</sup> Matter of B. & A. R. R. Co., 53 N. Y. 574; *In re N. Y. C. R. R. Co. v. M. G. L. Co.*, 63 id. 326; *Chicago, R. I. & Pacific R. R. Co. v. Town of Lake*, 71 Ill. 333; *Smith v. Chicago & Western Indiana R. R. Co.*, 105 id. 511; *C. & P. R. Co. v. Speer*, 56 Penn. St. 325; *In re N. Y. C. & H. R. R. R. Co.*, 77 N. Y. 248; *South Chicago, &c. R. R. Co. v. Dix*, Ill. Sup. Ct. 1884. The following instructions given in a case were held correct: "that the railroad company, under its articles of incorporation, can only take property for the purpose of a railroad and telegraph line, and having once condemned property, it can use it for any purpose connected with its enterprise. It can use the property condemned of appellant for its main or side track. It can build a depot, freight-house, engine-house, or warehouse, upon it at any time it chooses, or appropriate it for any railroad purpose it chooses." *Curtis v. St. Paul, Stillwater, & Taylor's Falls R. R. Co.*, 20 Minn. 28. Where a building erected on

land expropriated for the purpose of a railroad station is used as such, but a private business is carried on in certain rooms by one who is the agent of the railroad and receives his compensation in being allowed the use of these rooms, in which railroad freight is, however, stored when necessary, it is not such a diversion by the railway from the use for which the land was expropriated as to authorize an action for damages. *Hoggatt v. Vicksburg, Shreveport, & Pacific R. R. Co.*, 34 La. An. 624.

<sup>2</sup> *Getz's Appeal*, Penn. Sup. Ct. In *N. Y. Central & Hudson River R. R. Co. v. Manhattan Gas Light Co.*, 5 Hun (N. Y.), 201, 6 id. 149, 68 N. Y. 326, it was held that a railway company may take lands, under the general law, for the purpose of laying tracks from its main line to its stock-yards. "It hardly needs an argument," said DAVIS, P. J., "to establish that in a city like New York, depots for freight, and for vast number of cattle and other live stock that are constantly being

Under a statute authorizing the taking of lands "for the location, construction, and convenient use of the road," land cannot be taken

transported to the city, are as much within the purposes for which railroads are constructed, and as necessary to their operation as depots for the accommodation of passenger traffic. The argument indeed is more strongly in favor of the former, for while a railroad company might, with safety to itself, leave its passengers upon a public street to take care of themselves upon their individual responsibility, it could not do so with respect to the animals it transported, but must securely keep them from injuring and annoying the public, until proper delivery to owners or consignees. For the purpose of performing their duty in this respect with greater facility and safety to the public, and convenience to themselves, the respondents have obtained title to the large tract of land between Fifty-ninth and Sixty-fifth streets by purchase, and without resorting to the exercise of the right of eminent domain. Upon a large portion of this land they have erected extensive cattle depots and yards, and the buildings necessarily connected with such structures, and it is said their design is also to build an elevator, of sufficient dimensions to receive 1,500,000 bushels of grain, and an abattoir sufficient to meet the requirements of the city, in which business is to be carried on by other companies or persons, to whom such establishments are to be leased. If all this be so, the authority of the respondent to acquire by voluntary purchase land for these purposes, is within the power granted by the act, as was held by the court of appeals in *Rens. & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137, and the respondents are not seeking to obtain title by these proceedings to any lands for such purposes. They do not propose to erect an elevator or an abattoir on the appellant's land, but to use it for laying tracks, upon which their cars will run for the purposes of approach to their cattle depots and yards, and to the other structures mentioned; and the use for the public purpose of approaching structures for which lands might have been taken *in invitum*, is none the less so because their cars will at the same time approach structures not within

the application of the law of eminent domain. A railroad corporation cannot take land under the right of eminent domain for the purpose of founding a town or city on the plea that when founded it will furnish business to the road of the company. But it is quite another question if the company be the lawful owner of lands on which it has founded and erected a city, whether it may not lawfully acquire, under eminent domain, the lands necessary to connect its tracks, being within its lawful route, with that city. *A fortiori* would the same reasoning apply where the track to be laid was primarily to erections within the rule of necessity, and only incidentally to those which fall within the class of business conveniences. We are therefore of opinion that the appellants are not protected by the rule that lands cannot be taken "for subsidiary and extraordinary purposes," but that this case is clearly covered by the ruling of the Court of Appeals in the matter of the Petition of the New York & Harlem R. R. Co. *v. Kip*, 46 N. Y. 546. Upon the point, that the lands proposed to be taken are not necessary, because it might be practicable for the respondents to lay their tracks upon their own lands by adopting another curve, we are not prepared to concur with the appellants' counsel. It is not a question of possibilities nor of strict practicabilities within the opinion of engineers. No route was ever surveyed for a railroad which was not open to such objections, and if the right to take lands was to be determined by conflicting evidence whether, after all, the tracks might not, with greater or equal convenience, be laid elsewhere, the construction of a road would be attended with the most serious embarrassments. Reasonable necessity must be shown, but a reasonable discretion must be allowed to the officers who locate the tracks of a railroad, for it cannot be presumed that the corporation is unnecessarily incurring heavy expenses in obtaining lands, when those it already has would answer its purposes. We think enough was shown to bring this case within the rule of the authorities in respect to this question.

for the general uses of the road in addition to the uses specified in the statute,<sup>1</sup>—as, for dwellings for operatives,<sup>2</sup> for a temporary

Matter of N. Y. & Harlem R. R. Co. v. Kip, 43 N. Y. 446; Matter of Boston & Albany R. R. Co., 53 id. 574. It is not sought to interfere with 'the franchise of the gas company.' That will remain intact, although some portion of the property on which it is exercised be taken for a public use. It may be quite sound to say that the right of eminent domain does not attach to corporate franchises, and yet be quite unsound to insist that lands held by a corporation are exempt from its exercise. The doctrine insisted upon would create a distinction between the real estate of artificial and natural persons, to the great prejudice of the public. Such distinction does not, and ought not to exist. All lands in the State are subject to its right of eminent domain, whenever the exigency for its exercise arises, and no exemption grows out of the mere fact of the ownership and use of property by a corporate body. A banking-house, however valuable and useful, must give way before that power, whenever it stands as a barrier in the path of some necessary public avenue. It is another question how far lands already devoted to public uses and held for that purpose, can be taken under the right of eminent domain for another public use. Even upon that question I am not prepared to say that a use of inferior necessity must not yield to one of clearly superior necessity; as, for instance, a horse railway to the imperious necessity of rapid transit, or a chartered coach line or turnpike to the necessities of a railroad. It was held, in *White River Turnpike Co. v. Vermont Central R. R. Co.*, 21 Vt. 590, that there is no implied contract by the State, in a charter of a turnpike or other private corporation, that their property, or even their franchise itself, shall be exempt from the common liability of the property of individuals to be taken for public use. *Matter of Kerr*, 42 Barb. (N. Y.) 119. But I do not think

there is any occasion to decide that question in this case. The appellants, by their charter, are not clothed with power to exercise the right of eminent domain. They do not hold the lands in question under the exercise of any such power, but as a mere private manufacturing corporation. They are claimed to be *quasi public*, because they furnish light to a portion of the public streets, but they would be none the less so if the contract under which they light the streets was taken from them and given to another. Their public character springs out of the nature of the article they manufacture, and the manner in which they deliver it to their customers, through mains and pipes in the public streets, and the legal obligation they are under to furnish to all who desire and who pay for it along the street where their mains are laid. These facts in themselves do not make the defendants a public corporation, within the sense of that term when applied to that class of corporations which is clothed by constitutional legislation with power to exercise the right of eminent domain. I think, therefore, they have no more right to claim that they are shielded from the exercise of that right, from the nature of the article manufactured by them, and the convenience or necessity of its use by the public generally, than any other private corporation, created to make and vend to the public any other articles of prime necessity,—a corporation to manufacture cheap bread, for instance, or an ice company in midsummer. 'The fact that the public have an interest in the works, or the property, or the object of a corporation, does not make it a public corporation.' *Ten Eyck v. Delaware & Raritan R. R. Co.*, 18 N. J. L. 200; *Firsman v. The Belvidere & Delaware R. R. Co.*, 26 N. J. L. 148. The courts will act circumspectly and only on strong necessity, in allowing property devoted to uses of great public benefit to be taken; but where such

<sup>1</sup> *Spoofford v. Bucksport, &c. R. R. Co.*, 66 Me. 26.

<sup>2</sup> *Rensselaer, &c. R. R. Co. v. Davis*, 43

N. Y. 137; *Nashville, &c. R. R. Co. v. Cawarden*, 11 Humph. (Tenn.) 348; *State v. Mansfield*, 23 N. J. L. 510.

right of way,<sup>1</sup> for gravel-banks,<sup>2</sup> for a wharf,<sup>3</sup> nor for the purpose of a ferry.<sup>4</sup> It may take lands for its stations, and for necessary and convenient approaches thereto,<sup>5</sup> and also for its necessary workshops;<sup>6</sup> but it has been held that the manufacture of railroad cars is not so necessarily connected with the management of a railroad as to authorize a railroad company, by virtue of the right of eminent domain, to take lands compulsorily for the purpose of erecting such a manufactory thereon. So also in respect to dwelling-houses to rent to the employés of the company. But otherwise as to the land taken for storing temporarily lumber used on the road.<sup>7</sup>

Under the provisions of a railroad charter authorizing the company to take land contiguous to the line of their road for depots, shops, etc., provided the amount so taken does not exceed five acres, the company cannot take without the consent of the owner, as a site for a warehouse, a parcel of land four hundred yards from the line of their road, and build a narrow track from their road to such parcel of land, although the whole quantity required for the site of the warehouse, and the road leading to it, would not exceed five acres.<sup>8</sup> Under the power conferred upon a railroad corporation only "to enter upon any land, to survey, lay down, and construct its road;"

necessity is shown to exist, the power to act seems entirely clear. In this case the property sought to be taken is not, and has never been, in actual use for the purposes of the gas company. Doubtless, the use of their lands in the future, when the appellants come to need them, as they anticipate, will be more convenient without the additional tracks of the railroad than with them; but the railroad now crosses their land with several tracks, and the addition of two or three more, on land adjoining the present tracks, does not strike us as necessarily destructive of the uses to which the appellants wish to put their lands. The injury cannot be, as it seems to us, so greatly enhanced beyond what is already done, that their remaining land becomes useless to them. It is to be presumed that they will be protected to the extent that the act provides for, in their facilities of crossing and enjoying access to and from the divided parcel of their land, by the commissioners, or by the court on the coming in of their report; and this, we

think, is all, under the circumstances, they are entitled to claim."

<sup>1</sup> *Currier v. Marietta, &c. R. R. Co.*, 11 Ohio St. 228.

<sup>2</sup> *New York, &c. R. R. Co. v. Gunnison*, 1 Hun (N. Y.), 496.

<sup>3</sup> *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299.

<sup>4</sup> *Sandford v. Martin*, 31 Iowa, 67.

<sup>5</sup> *Nashville, &c. R. R. Co. v. Cawardin*, 11 Humph. (Tenn.) 348; *Giesy v. Cincinnati, &c. R. R. Co.*, 4 Ohio St. 308; *Cather v. Midland Ry. Co.* 17 L. J. N. S. 235; *Hamilton v. Annapolis, &c. R. R. Co.*, 1 Md. 553; *New York & Harlem R. R. Co. v. Kip*, 46 N. Y. 546.

<sup>6</sup> *Chicago, Burlington, &c. R. R. Co. v. Wilson*, 17 Ill. 123; *Low v. Galena, &c. R. R. Co.*, 18 id. 324; *Hannibal, &c. R. R. Co. v. Muder*, 49 Mo. 165. It may also take a location wide enough to admit of a telegraph line. *Prather v. Jeffersonville, &c. R. R. Co.*, 52 Ind. 16.

<sup>7</sup> *Eldridge v. Smith*, 34 Vt. 484.

<sup>8</sup> *Bird v. Wilmington & Manchester R. R. Co.*, 8 Rich. (S. C.) Eq. 46.

"to locate and construct branch roads from the main road to any town or places in the several counties through which the said road may pass;" to appropriate land for "necessary side tracks," and "a right of way over adjacent lands sufficient to enable such company to construct and repair its road," — such company, having located and being engaged in the construction of its permanent main road along the north side of a town, is not authorized to appropriate a temporary right of way, for a term of three years, along the south side of the town, to be used as a substitute for the main track while the same is in course of construction.<sup>1</sup>

It is no objection that there are other lands in the vicinity which would answer the purpose equally well, which might be acquired by purchase; as the location of the road, its buildings, and appendages is within the discretion of the corporation and its managers, and the courts will not, except in rare instances, supervise it.<sup>2</sup> The company is not confined to its present necessities, but may take such lands as may be rendered necessary by the demands of a growing traffic; and if it acts in good faith, and there is no evidence of malice or carelessness, the courts will not revise the exercise of its discretion.<sup>3</sup> But under this pretence, it cannot acquire lands for the purposes of speculation, or to prevent interference by competing lines, or in aid of collateral enterprises remotely connected with the operations of the road.<sup>4</sup> Where the charter or general statute gives a railway authority to take lands for the purpose of widening its road, the limitation upon such power is the reasonable necessity of the road.<sup>5</sup> And authority given to condemn lands "adjoining their road as constructed on their right of way as located" does not apply to lands which merely adjoin a side track.<sup>6</sup> It need only take the surface of the land, and is not obliged to take the mines and minerals.<sup>7</sup> Where the statute prohibits the taking of a quarry for railroad purposes within two hundred feet of a dwelling-house, a shanty put up for the sole purpose of preventing the land from being condemned will not operate as a protection.<sup>8</sup> The stones and gravel taken from one

<sup>1</sup> *Currier v. Marietta, Cincinnati, &c. R. R. Co.*, 11 Ohio St. 228.

<sup>2</sup> *New York, &c. R. R. Co. v. Kip*, 46 N. Y. 546.

<sup>3</sup> *Lodge v. Philadelphia, &c. R. R. Co.*, 8 Phila. (Penn.) 345.

<sup>4</sup> *Rensselaer & Saratoga, R. R. Co. v. Davis*, 43 N. Y. 137.

<sup>5</sup> *Beek v. United New Jersey R. R. Co.*, 39 N. J. L. 45.

<sup>6</sup> *State v. United New Jersey, &c. R. R. Co.*, 43 N. Y. L. 110.

<sup>7</sup> *In re Huddlesfield v. Jacomb*, L. R. 10 Ch. 92.

<sup>8</sup> *Morris v. Schallsville Branch of Winchester, &c. R. R. Co.*, 4 Bush (Ky.), 448.

part of the roadway may be employed upon another part,<sup>1</sup> and where a person conveys land to a railway company "for materials . . . for the use and purposes of the railroad, and for no other or different purpose," he cannot prevent the company from excavating the land to procure such materials, although as a consequence the owner's adjoining land caves into the pit, nor can he recover any damages therefor.<sup>2</sup> Lands lying outside the location, may be condemned for materials where the statute authorizes it, but the petition must disclose the use for which the lands are sought;<sup>3</sup> but where the statute merely authorizes a railway company to take and use such of the lands specified in its location as may be necessary for the purposes of constructing its road, it does not have authority to take compulsorily and permanently, land required only for the purpose of excavating materials therefrom.<sup>4</sup>

**SEC. 227. Public use: Question for the Court, when.** — The question as to whether or not a use is public, so that private property may be taken for its promotion, is *prima facie* for the legislature, but is subject to final revision by the courts. Indeed, the question as to whether the use is of such a public character as to warrant the exercise of this extraordinary power is always open to, and dependent upon the decision of the courts;<sup>5</sup> but the legislature is the exclusive judge of the agencies it will employ in carrying its will into effect,<sup>6</sup> and is the proper body to determine as to the necessity or fitness of taking private property for public use, and as to the extent and manner of the appropriation.<sup>7</sup> But in some of the

<sup>1</sup> Chapin v. Sullivan R. R. Co. 29 N. H. 561.

<sup>2</sup> Ludlow v. Hudson River R. R. Co. 4 Hun (N. Y.), 239.

<sup>3</sup> Valley R. R. Co. v. Bohm, 34 Ohio St. 114.

<sup>4</sup> Evensfield v. Mid-Sussex Ry. Co., 3 De G. & J. 286. See also N. Y. & Canada R. R. Co. v. Gunnison, 1 Hun (N. Y.), 496.

<sup>5</sup> Whitman v. Wilmington, &c. R. R. Co., 2 Harr. (Del.) 514; Buffalo, &c. R. R. Co. v. Brainard, 9 N. Y. 100; Central R. R. Co. v. Pennsylvania R. R. Co., 31 N. J. Eq. 475; 32 id. 755; Boom Co. v. Patterson, 98 U. S. 403; People v. Smith, 21 N. Y. 595; Coster v. Tide Water Co., 18 N. J. Eq. 54; Ford v. Chicago, &c. R. R. Co., 14 Wis. 609; New Central Coal Co. v. George's Creek Coal, &c. Co.,

37 Md. 537; Brooklyn Park Comm'rs. v. Armstrong, 45 N. Y. 234; Tyler v. Beacher, 44 Vt. 648; *In re* Deanville Cemetery Assoc., 66 N. Y. 569.

<sup>6</sup> Deanville Cemetery Assoc., 66 N. Y. 569; Matter of Fowler, 53 id. 62.

<sup>7</sup> People v. Smith, 21 N. Y. 595; Brooklyn Park Comm'rs. v. Armstrong, 45 N. Y. 244; Water Works Co. v. Burkhardt, 41 Ind. 364; Holt v. Somerville, 127 Mass. 408; Bloomfield, &c. Co. v. Richardson, 63 Barb. (N. Y.) 437; Brayton v. Fall River, 124 Mass. 95; Haverhill Bridge v. County Comm'rs., 103 id. 120; Eastern R. R. Co. v. Boston & Maine R. R. Co., 111 id. 125; *In re* Mt. Washington Road, 35 N. H. 134; Johnson v. Joliet, &c. R. R. Co., 23 Ill. 202; Bankhead v. Brown, 25 Iowa, 540.

States the Constitution leaves the question of the necessity of the use to be ascertained by a jury;<sup>1</sup> and in such cases, as well as where the act conferring the authority to take the lands makes its exercise conditional upon a jury finding that it is necessary, it must be found by them, not merely that the taking of such lands "was and is necessary for the purpose of constructing and operating said railroad," but also that it is necessary for the benefit of the public.<sup>2</sup> But where there is no provision in this respect, the necessity for the taking, as well as the selection of the land to be taken, rests in the discretion of the corporation. Thus, where the statute authorizes a railway corporation to acquire real estate, "for the purposes of its incorporation, or for the purpose of running or operating its road," although there are other lands in the same vicinity equally well adapted for the purpose, which possibly might be acquired by purchase, the location of the buildings and structures of the company is within the discretion of its managers, and courts will not ordinarily supervise it.

A usufructuary right, either temporary as to its continuance or limited as to its character, does not give to the company the property which it has a right, under the statute, to acquire. And whenever the proper running and operating of its road, and the interests of the public, require permanent structures, it is no objection to a proceeding to acquire the land in fee, that the company is a lessee of the premises for a term of years.<sup>3</sup> And in England, where a railway company has given notice to take land for some object which is clearly within their compulsory powers, the court will not interfere to restrain them merely on the ground that they might obtain the same object in some other way without taking the land.<sup>4</sup> The power of the legislature in this respect, except when restricted by the Constitution, is not subject to the revision of the courts;<sup>5</sup> and it may delegate this power to the corporation,<sup>6</sup> or it

<sup>1</sup> *Horton v. Grand Haven*, 24 Mich. 465.

<sup>2</sup> *Grand Rapids, &c. R. R. Co. v. Van Driele*, 24 Mich. 409.

<sup>3</sup> *New York, &c. R. R. Co. v. Kip*, 46 N. Y. 546.

<sup>4</sup> *Lamb v. North London Ry. Co.*, L. R. 4 Ch. App. 522.

<sup>5</sup> *Lehmick v. St. Paul, &c. R. R. Co.*, 19 Minn. 464; *Weir v. St. Paul, &c. R. R. Co.*, 18 id. 155; *Wilkin v. St. Paul, &c. R. R. Co.*, 16 id. 271; *Kramer v. Cleve-*

*land, &c. R. R. Co.*, 5 Ohio St. 146; *De Varaigne v. Fox*, 2 Blatchf. (U. S. C. C.) 95; *Charlestown, &c. R. R. Co. v. Blake*, 6 Rich. (S. C.) 634; *Raleigh, &c. R. R. Co. v. Davis*, 2 D. & B. (N. C.) 451; *Malone v. Toledo*, 34 Ohio St. 541; *People v. Smith*, 21 N. Y. 595; *Hingham, &c. Co. v. Norfolk Co.*, 6 Allen (Mass.), 353; *Philadelphia, &c. R. R. Co. v. Williams*, 54 Penn. St. 103; *Toledo, &c. R. R. Co. v. Daniels*, 16 Ohio St. 390.

<sup>6</sup> *Charlestown, &c. R. R. Co. v. Blake*,



may specifically designate the land and the estate therein to be taken.<sup>1</sup>

SEC. 228. **What lands, etc., may be taken.**—When authority is given to a railway company to take lands for the construction of its road, and no restrictions are placed thereon, it may take any property necessary for that purpose which has not already been devoted to a public use. It may take or remove dwelling houses on its route,<sup>2</sup> rights of way,<sup>3</sup> even underground,<sup>4</sup> leasehold estates,<sup>5</sup> and indeed estates of all descriptions, whether held by persons under a legal disability or not.<sup>6</sup> It may take lands used for wharves,<sup>7</sup> land under water,<sup>8</sup> lands of the State,<sup>9</sup> or of the United States,<sup>10</sup> or lands belonging to another corporation.<sup>11</sup> So it may take materials, as stones, gravel, etc., from adjoining lands for the construction of its

*ante*; National Docks R. R. Co. v. Central R. R. Co., 32 N. Y. Eq. 755.

<sup>1</sup> Brooklyn Park Comm'rs. v. Armstrong, 3 Lans. (N. Y.) 429; *affd.* 45 N. Y. 234; Rexford v. Knight, 11 N. Y.; Heywood v. New York, 7 id. 314; Stockton, &c. R. R. Co. v. Brown, 9 H. L. Cas. 246; Gilbert Elevated R. R. Co., *in re*, 70 N. Y. 361; New York Elevated R. R. Co., *in re*, 70 N. Y. 327; Iron R. R. Co. v. Ironton, 19 Ohio St. 299; Chicago, &c. R. R. Co. v. Lake, 71 Ill. 333; Cleveland, &c. R. R. Co. v. Speer, 56 Penn. St. 325; Parke's Appeal, 64 id. 137; Com. v. Franklin Canal Co., 21 id. 117; New York, &c. R. R. Co. v. Young, 33 id. 175; N. Y. Central R. R. Co., *in re*, 66 N. Y. 407.

<sup>2</sup> Brackett v. Ohio, &c. R. R. Co., 14 Penn. St. 241; Wells v. Somerset, &c. R. R. Co., 47 Me. 345; Cleveland, &c. R. R. Co. v. Speer, 56 Penn. St. 325. Unless forbidden to do so by its charter or the general law.

<sup>3</sup> Sixth Av. R. R. Co. v. Kerr, 72 N. Y. 330; Boston Gas-light Co. v. Old Colony, &c. R. R. Co., 14 Allen (Mass.), 444; Galena, &c. R. R. Co., 73 Ill. 494.

<sup>4</sup> Baltimore, &c. R. R. Co. v. Reaney, 42 Md. 117; Brown v. Corey, 43 Penn. St. 495.

<sup>5</sup> Cobb v. Boston, 109 Mass. 438.

<sup>6</sup> East Tenn., &c. R. R. Co. v. Lane, 3 Head (Tenn.), 63; Alabama, &c. R. R. Co. v. Kenney, 39 Ala. 307; North Penn. R. R. Co. v. Davis, 26 Penn. St. 238; Watson v. New York Central R. R. Co., 47 N. Y. 157.

<sup>7</sup> Boston, &c. R. R. Co. v. Old Colony, R. R. Co., 12 Cush. (Mass.) 605.

<sup>8</sup> *In re* N. Y. Central R. R. Co., 77 N. Y. 248.

<sup>9</sup> Indiana Central R. R. Co. v. State, 3 Ind. 421.

<sup>10</sup> Grintner v. Kansas Pacific R. R. Co., 23 Kan. 642; Union Pacific R. R. Co. v. Burlington, &c. R. R. Co. 3 Fed. Rep. 106; United States v. Railroad Bridge Co., 6 McLean (U. S.), 517.

<sup>11</sup> Bellona Company's Case, 3 Bland (Md.), 442. Although the charter of a corporation is a contract between the State and the incorporators, yet it, like other contracts, is made subject to the right of eminent domain in the State; and the property of a corporation and its franchises may therefore be taken for public uses, like the property of individuals, without violating the obligation of the contract. West River Bridge Co. v. Dix, 6 How. (U. S.) 507; Alabama, &c. R. R. Co. v. Kenny, 39 Ala. 307; State v. Noyes, 47 Me. 189; Pierce v. Somersworth, 10 N. H. 369; Crosley v. Hanover, 36 N. H. 404; Miller v. New York, &c. R. R. Co., 21 Barb. (N. Y.) 513; Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176; Armington v. Barnett, 15 Vt. 745; White River Turnpike Co. v. Vermont, &c. R. R. Co., 21 Vt. 590; James River, &c. Co. v. Thompson, 3 Gratt. (Va.) 270. Authority to condemn private lands for use by a corporation includes the right to condemn any estate or interest therein for the same object. Heyneman v. Blake, 19 Cal. 579.

road, and occupy such lands for the preparation of materials taken therefrom, for the road;<sup>1</sup> and the damages need not be assessed until after the materials are ascertained. So where the charter of a railroad company authorizes it to enter upon lands adjacent to its roadway and occupy them "for any purpose useful or necessary in the construction or repair of such roads," and providing a mode for the assessment of damages, the company by its workmen is entitled to

The right to receive toll for the transportation of travellers and others across a river on a public highway, is, at common law, a franchise of the Crown; and in the State of Georgia it belongs to the people collectively, and may be taken. *Young v. Harrison*, 6 Ga. 130. So may a dwelling-house be taken. *Wells v. Somerset, &c. R. R. Co.*, 47 Me. 345. And a mill-privilege. The creation of a great mill-power is a public use, for which private property may be taken under the Constitution; and the decision of the legislature as to whether the use is a public one is presumptively correct. *Hazen v. Essex Co.*, 12 Cush. (Mass.) 475. A franchise to build and maintain a bridge may be taken for a highway, whenever the legislature deem that the public exigencies require it, reasonable compensation being made. *Central Bridge v. Lowell*, 4 Gray (Mass.), 474. Indeed, the legislature has general power to pass laws providing for measures of internal improvement of the public rivers and other highways within the limits of the State, subject only to the restrictions and limitations in the Constitution. One of these restrictions is, that private property shall not be taken or applied to the public use without just compensation. This clause applies to property of a specific, fixed, and tangible nature, capable of being had in possession and transmitted to another, as houses, lands, and chattels. *Homochitto River v. Withers*, 29 Miss. 21. The right of the owner of a lot in a town or city to the use of the adjoining street is as much property as the lot itself; the owner of the lot cannot be deprived of this right by the obstruction of the street without compensation. It is immaterial in such case whether the owner of the lot owns to the middle of the street or not. *Lackland v. North Mis-*

*souri R. R. Co.*, 31 Mo. 180. The legislature are not restricted to taking a mere easement in the land of a citizen; they may take the entire right. *Railroad v. Davis*, 2 Dev. & B. (N. C.) L. 451. An injury to land which deprives the owner of the ordinary use of it is equivalent to a "taking" of the land; and where no compensation is provided for or made to the owner for the injury sustained, he is entitled to recover damages for such injury. *Hooker v. Canal Co.*, 14 Conn. 146. Injuries by backing water by dams, etc., upon the land of another seem to be embraced within the constitutional inhibition against injuring property by legislative authority without making compensation. *Wabash, &c. Canal v. Spears*, 16 Ind. 441. A divestiture of vested rights may be effected not only by a change or destruction of the title to the property, but also by a destruction of the property itself. *Cash v. Whitworth*, 13 La. An. 401. A partial destruction, or diminution of value, is a taking of private property. *Glover v. Powell*, 10 N. J. Eq. (2 Stock.) 211. To convert a common highway into a railroad is to impose an additional burden upon the land to the injury of the owner in fee, and is a taking of his property within the meaning of the provision of the Constitution, which forbids such taking without compensation. The State and municipal authorities combined cannot confer upon a railroad company the right to construct their road upon a highway without the consent of the owner of the fee, or making him compensation. *Williams v. New York Central R. R. Co.*, 16 N. Y. 97.

<sup>1</sup> *Vt. Central R. R. Co. v. Baxter*, 22 Vt. 365. But see *N. Y., &c. R. R. Co. v. Gunnison*, 1 Hun (N. Y.), 496.

enter upon lands adjacent to its roadway, and erect temporary buildings for the accommodation of its workmen,—including stables, wagon-houses, blacksmith-shops, hog-pens, etc.,—provided it takes no more land than is necessary for its purposes. In a Pennsylvania case<sup>1</sup> which involved these questions, KENNEDY, J., said: “It might in many cases be utterly impracticable to accomplish the construction of a railroad without such authority. The legislature, having granted in express terms, the right, with the power and authority to construct the road, must be presumed to have likewise granted every incidental power and authority *necessary to be exercised in order to carry the power expressly granted into effect*, subject however to such qualifications as may be mentioned in the act.”<sup>2</sup> So it may take springs near its road for a supply of water for its engines, when it cannot be otherwise obtained.<sup>3</sup> So it may cross highways<sup>4</sup> or a turn-

<sup>1</sup> *Lauderbrun v. Duffy*, 2 Penn. St. 398.

<sup>2</sup> *Vt. Central R. R. Co. v. Baxter*, ante.

<sup>3</sup> *Strohecker v. Alabama, &c. R. R. Co.*, 42 Ga. 509. But it must have the same condemned, and pay for it; and it has no right, by means of pipes or otherwise, to divert the water of a stream for its uses, to the detriment of a lower mill-owner. Thus, in *Garwood v. N. Y. Central, &c. R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452, a railway company, which was a riparian owner, diverted the water of a creek for its use in furnishing water to its locomotives, so as to perceptibly reduce the volume of water flowing therein, and to materially reduce the grinding power of the mill of plaintiff, a riparian owner below the railroad company, and in consequence thereof he sustained damage to a substantial amount. It was held that plaintiff was entitled to an injunction restraining the railroad company “from diverting the water to the injury of plaintiff.” The cases *Elliott v. Fitchburg R. R. Co.*, 10 Cush. (Mass.) 191; *Earl of Sandwich v. Great Northern Ry. Co.*, L. R. 10 Ch. Div. 707, distinguished. In such a case preventive relief is proper. 2 Story’s Eq. Jur. § 927; *Gardner v. Newburgh*, 2

*Johns. Ch. (N. Y.)* 162; *Swinton Water Works Co. v. W. & B. Canal Co.*, L. R. 7 Eng. & Ir. Ap. Cas. 697; *Campbell v. Seaman*, 63 N. Y. 568. DANFORTH, J., said: “Each riparian owner has the use of the water *ad lavandum et portandum* for domestic purposes and his cattle, though some portion be exhausted, and this without regard to the effect upon the lower owner. He may use for irrigation or manufacturing; but this privilege is connected with the land through which the stream runs, and cannot be exercised if thereby the lawful use of the water by a lower proprietor is interfered with to his injury. *Miner v. Gilmour*, 12 Moore’s P. C. 156; *Tyler v. Wilkinson*, 4 Mason, 397. The railroad company did not merely use the water, returning it to the stream, but diverted it from the land. The fact that plaintiff, as well as the railroad company, used the water for artificial purposes, would not affect plaintiff’s rights. The case presents no exception to the rule, that a riparian proprietor has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow, for any purpose to the prejudice of any other riparian proprietor. This is the doctrine of the civil and the common law,

<sup>4</sup> Subject to the duty of making compensation to the owner of the fee. State

*v. Montclair R. R. Co.*, 35 N. J. L. 328.

pike road.<sup>1</sup> But without express authority it cannot take a highway longitudinally *unless it is absolutely necessary*; and the presumption

and it stands upon the familiar maxim, *sic utere tuo ut non alienum lædas*." Nor have they the right to concentrate the surface water on their lands and discharge it on the lands of adjoining owners, even though it would naturally flow there. *McCormack v. Kansas City, &c. R. R. Co.*, 70 Mo. 359; 35 Am. Rep. 431. In *Rathke v. Gardner*, 134 Mass. 14, the defendant, the manager of a railroad, claimed the right to collect water in a ditch and discharge it upon the lands of a plaintiff, where it had not been accustomed to flow, on the ground that it was necessary to the proper construction and maintenance of the railroad. It was held that if the right existed it constituted an easement to which plaintiff's land was subject. As between the owners of contiguous estates, it is settled in this commonwealth that the right of an owner of land to occupy and improve it as he may see fit, either by erecting structures or by changing the surface, is not restricted by the fact that such use of his own land will cause surface water to flow over adjoining lands in greater quantities or in other directions than it was accustomed to flow. If by this use the adjoining land is damaged, it is *damnum absque injuria*. *Gannon v. Hargadon*, 10 Allen (Mass.), 106. This right exists in the owner by virtue of his dominion over his own soil, and not by virtue of any easement or servitude over the lower land. That this is so is clear from the fact that the adjoining owner may himself erect such structures or take such measures as he sees fit on his own land to divert the surface water and prevent its flowing upon his land; and in so doing he does not violate or obstruct any easement of the owner whose land is of a higher level. *Bates v. Smith*, 100 Mass. 181. See *Parks v. Newburyport*, 10 Gray (Mass.), 28. But there is the well-settled distinction, that although a man may make any fit use of his own land which he deems best, and will not be responsible for any damages

caused by the natural flow of the surface water incident thereto, yet he has not the right to collect the surface water on his own land into a ditch, culvert, or other artificial channel, and discharge it upon the lower land to its injury. And if he does this, and continues it adversely under a claim of right for more than twenty years, he thereby acquires a right which is in the nature of a servitude or easement upon the lower land. *White v. Chapin*, 12 Allen (Mass.), 516; *Curtis v. Eastern R. R. Co.*, 14 id. 55, and 98 Mass. 428. As between adjoining landowners, therefore, if one owner thus discharged water through an artificial channel upon the lower land of the other, and if he claimed the right to do so, either by grant or prescription, the right to an easement would be concerned in the case. Nor has it the right to erect embankments to divert the waters overflowing from a natural stream in time of freshets and turn it upon the lands of others. *Shane v. Kansas City, &c. R. R. Co.*, 71 Mo. 237; 36 Am. Rep. 480; *Gilham v. Madison Co. R. R. Co.*, 49 Ill. 487. In *Gormley v. Sanford*, 52 Ill. 160, *LAWRENCE, J.*, said: "This question has already been decided by this court in *Gillham v. Madison Co. R. R. Co.* . . . In the opinion filed in that case we said, although there was a conflict of authorities among the courts of this country, yet the rule forbidding the owner of the servient heritage to obstruct the natural flow of surface water was not only the clear and well-settled rule of the civil law, but had been generally adopted in the common-law courts both of this country and in England. Various cases bearing on each side of the question are cited in that opinion, and it is not necessary to cite them again. This rule was thought by this court, in that case, to rest upon a sound basis of reason and authority, and was adopted. We find nothing in the argument or authorities presented in the present case to shake our confidence in the

<sup>1</sup> *Baltimore, &c. Turnpike Co. v. Union R. R. Co.*, 35 Md. 224. And such cross-

ing cannot be regarded as a condemnation of the franchise of the turnpike company.

is in favor of the public, and against the necessity for the taking; and the question is not one of expediency or of expense, but of practical necessity, to give effect to the grant.<sup>1</sup>

conclusion at which we then arrived. In our judgment, the reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water-course fed by remote springs, applies with equal force to the obstruction of a natural channel through which the surface waters, derived from the rain or snow falling on such field, are wont to flow. What difference does it make in principle whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills, and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower? The cases asserting a different rule for surface waters and running streams furnish no satisfactory reason for the distinction. It is suggested in the argument, if the owner of the superior heritage has a right to have his surface waters drain upon the inferior, it would follow that he must allow them so to drain, and would have no right to use and exhaust them for his own benefit, or to drain them in a different direction. We do not see why this result should follow. The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage; and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule, at once so equitable and so easy of application, as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land." In *Shane v. Kansas City, &c. R. R. Co.*, *ante*, *NAPTON, J.*, said: "I

confess, for myself, that, like Mr. Justice LAWRENCE, I am unable to perceive the distinction between surface water coming, as he says, from the clouds, and that which rises in a spring, especially in this case, where the surface water comes from the Rocky Mountains, a thousand miles from where the overflow of the Missouri River occurs, occasioned, as it is, not by rains or snows in its vicinity, but by the melting of snows upon the mountains, and by the accession of a thousand tributary streams. But it must be considered as well settled, that this overflow of the Missouri is what is in law termed 'surface water.' In *Kauffman v. Griesemer*, 26 Penn. St. 408, the instructions of the judge who tried the case were, that the water which the defendant obstructed was not a living stream, but came from rains and snows; but that the accustomed, though not continuous, flowage of such water was, in the eye of the law, a stream, and no more to be obstructed than if it was a channel of a continuous stream that never failed. These instructions were approved by the Supreme Court, and that court observed that: 'The plaintiffs had no right to insist upon his receiving waters which nature never intended to flow there, and against any contrivance to reverse the order of nature he might peaceably take measures of protection.' In *Martin v. Riddle*, 26 Penn. St. 415, Judge LOWRIE says: 'Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position. . . . Hence, the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped, nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is diverted from its natural channel, and a

<sup>1</sup> *State v. Montclair R. R. Co.*, *ante*; *Kaiser v. St. Paul, &c. R. R. Co.*, 22

Minn. 149. See *Baxter v. Spuyten Duyvil, &c. R. R. Co.*, 61 Barb. (N. Y.) 428.

A grant of power to accomplish any particular enterprise of a public nature carries with it, so far as the grantor's own power

new channel made on the lower ground ; nor can he collect into one channel waters usually flowing off into his neighbor's field by several channels, and thus increase the wash upon the lower fields.' The Supreme Court of Ohio, in *Butler v. Peck*, 16 Ohio St. 343, unhesitatingly adopted the principle thus decided in Pennsylvania. The question in that case was 'whether an owner of land having upon it a marshy sink or basin of water, which basin, as to a considerable portion of the water collected on it, has no outlet, may lawfully throw such water by artificial drains upon the land of an adjacent proprietor.' The court say: 'We are clear that no such right exists. It would sanction the creation, by artificial means, of a servitude which nature has denied. The natural easement arises out of the relative altitudes of adjacent surfaces as nature made them, and those altitudes may not be artificially changed to the damage of an adjacent proprietor.' In *North Carolina*, the Supreme Court, in *Overton v. Sawyer*, 1 Jones L. 308, observed: 'The defendant had a right to have the water allowed to pass off his land through the natural drain ; and when the plaintiff, by means of the embankment across this natural drain, obstructed the water and interfered with this right, this latter (the defendant) had a cause of action against the former for causing the obstruction.' What is said by the Court of Errors in *New Jersey*, in the case of *Earl v. DeHart*, 12 N. J. Eq. 280, seems to conform to Mr. Justice LAWRENCE's views in the *Illinois* case we have cited, and to apply to the slough, or swale, or hollow, through which the waters of the river passed when they overflowed its banks, and across which the defendant's road was built. The Chancellor says: 'The facts admitted in the answer show that this is an ancient stream or water-course, and that it is a natural water-course, in the etymological use of the term. A water-course is defined to be a channel or canal for the conveyance of water, particularly in draining lands. It may be natural, as when it is made by the natural flow of the water caused by the

general superficies of the surrounding land, from which the water is collected into one channel ; or it may be artificial, as in case of a ditch or other artificial means used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow in consequence of the natural formation of the surface of the surrounding land. It is an ancient water-course if the channel through which it naturally runs has existed from time immemorial. Whether it is entitled to be called an ancient water-course, and as such legal right can be acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams of water, which, if dammed off, would inundate a large region of country, are dry for a great portion of the year. If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows and has flowed from time immemorial, such channel is an ancient natural water-course.' The court therefore held that where the surface of the ground is such as to collect water at different seasons of the year to an extent which requires an outlet, and if such is always the case in times of heavy rains and melting snow, and if that flow of water produced a natural channel through the lands of different persons where such accumulated surplus water has always been accustomed to run, a court of equity would protect such channel from obstruction to the injury of any one through whose land it runs. This corresponds with the view of the judge in *Kauffman v. Griesemer*. The judge who tried this case observes: 'The declaration speaks of a stream of water being used to flow. There is no stream, in the usually received sense of that word, as being a continuous flowage of water. The water that flowed down was such as came from springs which do

extends, an authority to do all that is necessary to accomplish the principal object. Thus, under a charter authorizing the construction

not seem ever to have had a continuous flow that reached defendant's land, and such as came from rains and snows. But the accustomed, though not continuous, flowage of water, is a stream in the eye of the law, and its channel is no more to be obstructed than if it was the channel of a stream that never failed. . . . Whatever is the natural direction of the excess of waters in floods and freshets, as in seasons of ordinary water, must be left as nature has made it. No one has a right to divert it from himself and cast it upon his neighbor, to save himself at the expense of another.' Of course the immemorial usage spoken of in the New Jersey case can hardly be claimed here, since there was no witness in the case who spoke of having any knowledge of the river floods beyond thirteen years before the trial; but the question as to this slough being the natural channel through which the waters of the Missouri River passed in times of floods was put to the jury, in an instruction given by the court, and was found by the jury; and upon the evidence submitted they could not have found otherwise than they did, for upon this point all the witnesses were agreed, though they could not speak of time immemorial, beyond which the memory of man did not reach. The principles which are at the bottom of this case, if taken from the civil law, — a system which, as Judge DILLON remarks in *Livingston v. McDonald*, 'embodies the accumulated wisdom and experience of the refined and cultivated Roman people for a thousand years, and though not binding as authority, is of great service to the inquirer after the principles of natural justice and right,' and from which many of the usages of the common-law and equity courts, both in England and this country, are derived, — were recognized by this court as early as the case of *Laumier v. Francis*, 23 Mo. 181, in which the opinion of this court was delivered by Judge LEONARD, when associated with Judges SCOTT and RYLAND, all three of whom are well known in this State, and have been in the front rank of our most eminent jurists. We deem it unnecessary to refer particu-

larly to the decisions in Louisiana, as they are uniformly in conformity with the principles of the cases already cited from Pennsylvania and other States. On the other hand, the cases in Massachusetts and several other of the New England States, following the case of *Gannon v. Hargadon*, 10 Allen, 106, adopt the rule of allowing every proprietor to control surface water as he pleases, without regard to contiguous proprietors. Still, as even in these States this right is carefully distinguished from similar rights where a water-course exists by grant or prescription, it is not entirely certain how the courts would apply these doctrines to a case like the present. So, in New York, the general principle asserted in *Gannon v. Hargadon* seems to be maintained in *Goodale v. Tuttle*, 29 N. Y. 459, where Judge DENIO says: 'In respect to the running off of surface water, . . . I know of no principle which will prevent the owner of land from filling up the wet and marshy places in his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it.' This is a mere reiteration of the doctrine of *suave qui petit*, or, as popularly translated into our vernacular, 'the devil take the hindmost.' We prefer that asserted by this court in *Laumier v. Francis*, and repeated in *McCormick v. K. C.*, *St. Jo. & C. B. R. R.* Nor do we think that equitable and just principles, as we understand it, will materially retard agricultural operations or improvements. The facts in the present case show that the defendant could have built a rock culvert at the crossing of this hollow, at about the same cost with the dirt embankment. The engineer seems to have been misled by the dry and rich soil which extended to the very bottom or lowest part of the swale, portions of which were in cultivation; and although the road was equally strong and safe with a rock culvert or a dirt embankment, the engineer preferred the latter, as 'not so liable to wash out when floods come, and drift-wood and other débris fill the culvert and injure it or the bank adjoining it.' The first in-

of a railroad "to the place of shipping lumber" on a tide-water river, the right of location is not restricted to the upland or the shore, but the road may be extended across the flats, and over tide water to a point at which lumber may conveniently be shipped.<sup>1</sup> A general power to a corporation to construct a road and bridges between given *termini*, the natural and convenient route of which would pass several navigable streams, authorizes the corporation to construct bridges over such navigable streams, in a manner that will not destroy the navigation of them. The power must, nevertheless, be exercised discreetly, and with a due regard to the privileges of others.<sup>2</sup> So authority to a corporation to construct a canal to the river, and there to build wharves, gives them no right to build wharves so as to cut off a street dedicated to the public, thereby preventing that access to the water which had been previously enjoyed, — the legislature not having given that right in terms.<sup>3</sup>

Under the charter of a railroad company providing that lands, when required by the company for the purposes of the road, may be taken at a valuation, the corporation alone is not allowed to determine what is required for such purposes; otherwise parcels of land might be obtained, upon payment of compensation, for purposes of speculation or even malicious gratification. Hence an application by it for the appointment of commissioners to assess the value of land should set forth the particular purpose for which it is needed, and should be accompanied with affidavits or other evidence showing that the occasion exists for the appointment. If the land-owner traverses the propriety of the occasion, or its existence, a preliminary trial and decision must be had.<sup>4</sup>

Where persons have special powers conferred on them by Parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind. Therefore, a company authorized to take, upon giving compensation, the lands of any person for a definite object, may be restrained by injunction from any attempt to take them for another object.<sup>5</sup>

struction given for the plaintiff contained all the law necessary to enable the jury to pass upon the facts submitted, and the second and third, and the sixth, given for defendant, certainly cannot be complained of by defendant."

<sup>1</sup> Peavey v. Calais R. R. Co., 30 Me. 498; Babcock v. Western R. R. Co., 9 Met. (Mass.) 553.

<sup>2</sup> Attorney-General v. Stevens, 1 N. J. Eq. 369.

<sup>3</sup> Jersey City v. Morris Canal &c. Co., 12 N. J. Eq. 547.

<sup>4</sup> South Carolina R. R. Co. v. Blake, 9 Rich. (S. C.) L. 228.

<sup>5</sup> Galloway v. Mayor, &c. of London, 1 L. Rep. H. of L. 34.



It cannot take lands which are held by a municipal corporation for certain specified purposes, as a reservoir, and water-works for supplying a city with water,<sup>1</sup> nor lands which have been laid out as public parks,<sup>2</sup> unless the power to do so is given in express terms. The rule may be said to be that when property has already been appropriated to public use, and is in fact in such use in the hands of one railroad corporation, it cannot rightfully be taken away from such corporation, even by authority of a statute, for the purpose of subjecting it to the same public use in the hands of another corporation. To warrant the taking of property of one party already appropriated to public use, and placing it wholly or in part in the hands of another party for a public use, it is essential that the new use should be different, and also that the change shall be for the benefit of the public. Whether the new use is different from the present one is a judicial question for the courts to decide; but where such new use may be in its nature a public benefit, whether the change will be for the benefit of the public is a political question to be determined by the law-making power.<sup>3</sup>

A railroad company was prohibited from holding land, except for the "construction of the road, or for depots, toll-houses, and other necessary works," and was authorized to enter upon and occupy land for the purpose of making the road, the road not to be more than five rods wide, etc. It was held that the company could occupy for the purposes of the road no more than the five rods; and such erections as were necessary for the railroad as such were included by implication; but that such implication did not extend to a warehouse.<sup>4</sup>

<sup>1</sup> *State v. Montclair R. R. Co.*, *ante*.

<sup>2</sup> *Boston v. Albany R. R. Co.*, matter of, 53 N. Y. 574.

<sup>3</sup> *Lake Shore & Michigan Southern R. R. Co. v. Chicago & Western Indiana R. R. Co.*, 100 Ill. 21.

<sup>4</sup> *Cumberland Valley R. R. Co. v. McIanahan*, 59 Penn. St. 23. In Maine under the statute the purposes for which a railway company has the power to take lands as for public uses, for the location, construction and convenient use of its railway, are for necessary tracks, side tracks, depots, wood sheds, repair shops, and car, engine, and freight houses. *Spofford v. Bucksport & Bangor R. R. Co.*, 66 Me. 26. Where the charter of a railroad company authorized the taking of land by

the company for their road, not exceeding six rods in width, for a certain period, and by a later act the time for completing the road was extended, and all the rights, etc., of the company were continued, — it was held that during the extended term the company might take six rods in width, notwithstanding the general statute of the State, regulating railroads, allowed only four rods to be taken. *Eaton v. European, &c. Ry. Co.*, 59 Me. 520. In England, under the statute, where the taking of a part of the premises destroys the value of the remaining portion for the purposes for which it is used, the owner can compel the company to take the whole. Thus a man with his dwelling-house in a piece of ground  $2\frac{1}{2}$  acres in extent, and sur-

Where a railroad company has authority to condemn only one hundred feet in width, for right of way, it is not necessary that the track should be located in the middle of the strip condemned. Nor will the fact that it owns land adjacent to that which it seeks to condemn restrict its right of condemnation.<sup>1</sup> The corporation may exercise its discretion as to what land it will take, and it is no objection, if it acts in good faith, that other lands in the vicinity could have been obtained by purchase that would have answered its purposes just as well.<sup>2</sup> If it acts in bad faith, equity will interfere, but only where there is an abuse of its powers.<sup>3</sup> The fact that it already has a lease of the lands which it seeks to take is no objection,<sup>4</sup> but it cannot take lands *in invitum* when it already owns lands equally useful for that purpose.<sup>5</sup>

**SEC. 229. Franchises, etc., of one Railroad may be taken for another, when.** — There can be no such thing as an extinction of the right of eminent domain,<sup>6</sup> and the legislature cannot contract with

rounded by brick walls, used a part of the land as a nursery-garden for trade purposes. It was held that he was entitled under § 92 of the land clauses act, 1845, to compel a railway company, proposing, without actually touching the house, to take the green-houses and a part which had been planted and used for ornamental purposes, to take the whole of the land. *Salter v. Metropolitan District Ry. Co.*, L. R. 9 Eq. 432. So a manufactory sometimes worked, or in part worked, by water-power, had a reservoir which was supplied by a goit, into which water was turned out of a natural river at some distance off. At the point where the goit commenced there was a weir in the river; there were shuttles for regulating the flow of water into the goit and a mill-house for the occupation of a man whose duty it was to attend to the shuttles. A railway company proposed to take a part of the weir, shuttles, mill-house, and bed of the stream. It was held that they were bound to take the whole manufactory. *Furniss v. Midland Ry. Co.*, L. R. 6 Eq. 473.

<sup>1</sup> *Stark v. Sioux City, &c. Ry. Co.*, 43 Iowa, 501; see *Munkers v. Kansas City, &c. R. R. Co.*, 60 Mo. 334.

<sup>2</sup> *Eldredge v. Smith*, 34 Vt. 484; *Lodge v. Phila. &c. R. R. Co.*, 8 Phila. (Penn.) 345; *N. Y. &c. R. R. Co. v. Kip*,

46 N. Y. 546; *Ford v. Chicago, &c. R. R. Co.*, 14 Wis. 609.

<sup>3</sup> *Flower v. London, &c. Ry. Co.*, 2 Dr. & S. 330; *Eversfield v. Mid. Sussex Ry. Co.*, 3 De G. & J. 286; *Webb v. Manchester, &c. Ry. Co.*, 4 My. & C. 116; *Norton v. London, &c. Ry. Co.*, 13 Ch. Div. 268; *Gt. Western Ry. Co.*, L. R. 7 H. L. 283; *Best v. Howard, L. R.* 12 Ch. Div. 1; *Hooper v. Bourne, L. R.* 3 Q. B. Div. 258.

<sup>4</sup> *New York, &c. R. R. Co. v. Kip*, 46 N. Y. 546.

<sup>5</sup> *New Central Coal Co. v. George's Creek Coal, &c. Co.*, 37 Md. 537.

<sup>6</sup> *Beekman v. Saratoga R. R. Co.*, 3 Paige (N. Y.), Ch. 45. Strictly speaking, there is and can be no such thing as an extinction of the right of eminent domain. If the public good requires it, *all kinds of property are alike subject to it, as well that which is held under it as that which is not. Even contracts and legislative grants, which are beyond the reach of ordinary legislation, are not exempt.* The legislature may authorize a railroad company to locate its road upon land already appropriated, under a previous and equal authority, by another railroad company. *New York, &c. R. R. Co. v. Boston, &c. R. R. Co.*, 36 Conn. 196. So it has power to authorize one corporation to take the property of another, and devote it to a different

a corporation that its property shall not be taken, so as to defeat the exercise of the power by a subsequent legislature;<sup>1</sup> as to admit such

public use; *but intention to confer this power will not be implied from a grant of power to take property, couched in general terms.* Matter of Buffalo, 68 N. Y. 167. Property appropriated to a particular public use is not thereby withdrawn from the liability to be taken for a different and inconsistent use, *whenever in the judgment of the legislature, the public exigency may require.* The power of eminent domain is a prerogative of sovereignty. It is not exhausted by use, and can only be limited by the public exigency upon which it is founded. But where land is appropriated, pursuant to legislative authority, to an important public use, a subsequent grant cannot be held to authorize the same land to be taken for a use wholly inconsistent with, and which in the actual circumstances, must necessarily supersede the former use, unless such appears, by express words, or by necessary implication, to be the legislative intent. Little Miami, &c. R. R. Co. v. Dayton, 23 Ohio St. 510. Where the legislature has power to require one public easement to yield to another more important, *the intention to grant such power must appear by express words, or by necessary implication.* Such implication can arise only when requisite to the exercise of the power expressly granted; and it can be extended no further than the necessity of the case requires. Hickok v. Hine, 23 Ohio St. 523. But lands of railroad corporations not actually in use by them, or not absolutely necessary for the enjoyment of their franchises, are subject to be taken under the exercise of the right of eminent domain under legislative authority, the same as lands of individuals, though they may be taken from the actual and profitable use of the owners. Peoria, Pekin, &c. R. R. Co. v. Peoria & Springfield R. R. Co., 66 Ill. 174. There is no distinction between corporeal and incorporeal property, and a franchise is subject to the power of eminent domain as well as any other property. No species of property is withdrawn from it, unless by express provisions of the Constitution. James River Co. v. Thompson, 3 Gratt. (Va.) 270; Newcastle R. R. Co. v. Peru

R. R. Co., 3 Ind. 464; Salem Turnpike v. Lyme, 18 Conn. 451; Tuckahoe Canal Co. v. Tuckahoe R. R. Co., 11 Leigh (Va.), 42; La Fayette Plank Road Co. v. New Albany R. R. Co., 13 Ind. 90; State v. Canterbury, 28 N. H. 195; West River Bridge v. Dix, 16 Vt. 446; West River Bridge v. Dix, 6 How. (U. S.) 507; Black v. Del. & Rar. Canal Co., 22 N. J. Eq. 130.

<sup>1</sup> Backus v. Lebanon, 11 N. H. 19; Newcastle R. R. Co. v. Peru R. R. Co., 3 Ind. 464; Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) 344; State v. Hudson Tunnel Co., 38 N. J. L. 548; Proprietors of Locks v. Lowell, 7 Gray (Mass.), 223. In White River Turnpike Co. v. Vt. Central R. R. Co., 21 Vt. 590, it was held that there is no implied contract by the State in a charter of a turnpike or other private corporation, that their property, or even their franchise, shall be exempt from the common liability of the property of individuals to be taken for the public use; that it may be taken, on proper compensation being made; that a railroad is an improved highway, and that property, taken for its use by authority of the legislature, is property taken for the public use, as much as if taken for any other highway; and that the legislature may delegate its power to a railroad corporation, to take private property for public use in the construction of their railroad, as well as to a turnpike corporation to take the like property for the public use in the construction of a turnpike road. Also, that where there has been a legislative grant to a private corporation to erect a bridge, a turnpike, or other public convenience, which is not in its terms exclusive, there is no constitutional obligation on the legislature, not to grant to a second corporation the right to erect another bridge, or turnpike, for a similar purpose, to be constructed so near the former, as greatly to impair, or even to destroy, the value of the former, — and this without making compensation to the first corporation for the consequential injury. But so far as the real estate of such private corporation, or their interest in real estate,

a doctrine would enable the legislature to divest the State of its sovereignty, and would often retard and impede the development of other

is concerned, they are entitled to the same constitutional protection that an individual would be. The property of either may be taken for public use by authority of the legislature, if compensation be made therefor, but not otherwise. Although the charter of the Vermont Central Railroad Company does not in terms empower the corporation to locate their road along the valley of White River, yet it must be taken, in the absence of evidence to show that there was any other practicable route to the proper point on the Connecticut River designated in the charter, or that the route adopted was unsuitable, that the road was properly located in the valley of White River. Under the tenth section of the statute incorporating the Vermont Central Railroad Company, that corporation have power to enter upon and cross a turnpike road, as well as any other highway, making compensation to the turnpike corporation for the injury they should sustain. And the provisions of the charter of that corporation, prescribing a mode for making compensation by appraisal for injuries to land entered upon by them, may be fairly construed to apply to the property and interest of a turnpike corporation in the land embraced by their road, and in the road itself, as tangible property. A mandatory injunction was issued compelling a railroad company to pull down walls which it had built in order to prevent another railway company from crossing its line. *Great North of England, &c. Ry. Co. v. Clarence Ry. Co.*, 1 Coll. 507. In making a railway crossing, the company may, in building a bridge, place temporary scaffolding upon the land of the railway company over whose line the crossing is to be made. *Great North of England Ry. Co. v. Clarence Ry. Co.*, *ante*. And where a railway company was authorized by an act to build its railway to a certain point, and no compulsory power was clearly given for crossing another railway, that had to be crossed to reach the point named in the act, it was held that the crossing could not be effected without consent, even although the failure to obtain consent would prevent the construction of

the railway. *Clarence Ry. Co. v. Great North of England Ry. Co.*, 4 Q. B. 46. One railway company has no right without compensation to take property of another for the construction of its road; the property rights of a railway company in its right of way are protected by the same restrictions against appropriation by any other company for railroad purposes or other public uses as is afforded by the constitution and laws in the case of the private property of an individual. *Grand Rapids, Newaygo, &c. R. R. Co. v. Grand Rapids & Indiana R. R. Co.*, 35 Mich. 285. And where the right of way is sought across or under the track of another railway company, or through its embankment, the latter company is entitled to receive such damages as will enable it to place its track over the point at which the ground is condemned in as safe a condition, as nearly as the nature of the case will admit, as it was before the making of the excavation. The damages should cover additional expense for watchmen when travel over the excavation is rendered hazardous; the expense of building and maintaining permanent abutments, for retaining the walls; losses incident to rebuilding or repairing, and contingent losses by fire or otherwise; and if any other kind of bridge over the excavation is more safe than a wooden one, the compensation should be sufficient to enable the company to erect and maintain perpetually a bridge of that degree of safety, and likewise to reimburse it for all inconvenience and expense incident to the erection and maintenance of such a bridge. *St. Louis, Jacksonville, & Chicago R. R. Co. v. Springfield & Northwestern R. R. Co.*, 96 Ill. 274. Land already acquired by one railroad corporation, and held for the necessary enjoyment of its essential franchises, cannot be condemned and appropriated in the usual way by another corporation. *Lake Shore & Michigan Southern R. R. Co. v. New York, Chicago, & St. Louis R. R. Co.*, 8 Fed. Rep. 858; *Cleveland & Pittsburgh R. R. Co., in re*, 2 Pittsb. (Penn.) 348. Nor has one horse railway company a right, by proceedings

important enterprises, and is also contrary to sound public policy; and it may be said to be well established that *the franchises or property of*

of condemnation, to take for its joint use a part of a previously constructed railway of another company in successful operation. A court of equity will enjoin such a proceeding. *Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co.*, 81 Ill. 523. But land acquired by one railway company under a legislative grant, and unnecessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. *North Carolina R. R. Co. v. Carolina Central R. R. Co.*, 83 N. C. 489; *Peoria, Pekin, & Jacksonville R. R. Co. v. Peoria & Springfield R. R. Co.*, 66 Ill. 174. And although a right of way is limited to the use of the land for the construction and operation of a railroad, this limited use is property, and any interference with it at any point, by condemnation for another railroad, whereby the use is impaired, may be considered in connection with and as affecting its use as an entirety. *Lake Shore & Michigan Southern R. R. Co. v. Chicago & Western Indiana R. R. Co.*, 100 Ill. 21. It is not competent to a later railway company, in the absence of a power for that purpose, given in express terms by its special act, to acquire compulsorily the soil and freehold in lands already vested in, and actually used by, an earlier railway company for the purposes of its undertaking; although the land lies within the "limits of deviation" shown by the parliamentary plans of the later company, and its special act confers upon it the usual general power to enter upon and take such of the lands delineated upon the plans as may be required for the purposes of its railway. *Dublin & Drogheda Ry. Co. v. Navan & Kingscourt Ry. Co.*, 5 Ir. Eq. Rep. 393. The condemnation of lands owned by one railroad company—not used for railroad purposes—by another company for use in the construction of a railroad will be unavailable to condemn the franchise of the former. All that will be acquired will be a right of way, and, incidentally, the power to cross the track of the former where the routes of the two roads cross each other. *State v. Easton &*

*Amboy R. R. Co.*, 36 N. J. Law, 181. In a proceeding to condemn a part of the property of one railroad for the use of another, leading from other and different points and regions of country, the use is not the same as that of the prior road, but is rather a joint or co-operative use, to be exercised and enjoyed by both railroad companies, so as to furnish the public an additional line of travel and transportation, and may be properly granted by legislative action. *Lake Shore & Michigan Southern R. R. Co. v. Chicago & Western Indiana R. R. Co.*, 97 Ill. 506. In a proceeding to condemn a right of way by one railroad company across the right of way of another company upon certain blocks, the company whose franchise is sought to be taken in part will not be restricted in its compensation to the damage to its right of way or railroad property within the blocks. In such case it will be competent for the defendant to recover for damages it would be subjected to by placing obstructions upon its right of way, in maintaining and operating the proposed new road, whereby access to different parts of its line would be interfered with, and its capacity for the transaction of business destroyed or impaired. And where land has no market value from the fact of its being used as a right of way for a railroad, and devoted to a special use of making railroad transfers, estimates of its value with reference to such use, by those competent to speak in that regard, should be received on the question of compensation to be paid for its condemnation for the use of another railroad company for its right of way, and it is error to refuse such evidence. *Lake Shore & Michigan Southern R. R. Co. v. Chicago & Western Indiana R. R. Co.*, 100 Ill. 21. A statute authorized a railway company to take for its purposes land occupied by another railway company, and provided that all general laws relating to the taking of land for such purposes should govern the proceedings. It was held that the statute was constitutional, although the company whose land was taken was thereby deprived of part of its business. *Eastern*

*one railroad may be taken for the construction of another, in all cases where the property of an individual may be taken, upon making proper compensation therefor.*<sup>1</sup> The principle that the charter of a corpora-

R. R. Co. v. Boston & Maine R. R. Co., 111 Mass. 125.

<sup>1</sup> MARSTON, J., in *Grand Rapids, &c. R. R. Co. v. Grand Rapids & Indiana R. R. Co.*, 35 Mich. 265; *People v. Salem*, 20 Mich. 452. In *Bridgeport v. N. Y. & New Haven R. R. Co.*, 36 Conn. 255, "undoubtedly" says BUTLER, J., "the legislature may . . . authorize another company to appropriate its property and its franchise, upon making just compensation therefor." And in *N. Y. &c. R. R. Co. v. Boston, &c. R. R. Co.*, 36 id. 196, the court directly held that such power might be exercised; and this was ratified in a later case. *Evergreen Cemetery Ass. v. New Haven*, 43 Conn. 234; *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. (Mass.) 360; *Springfield v. Conn. R. R. Co.*, 4 Cush. (Mass.) 63. In *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. (Mass.) 360, a corporation was empowered by its charter to build a dam westerly from Boston to Brookline, over an arm of the sea, and from this main dam to run a cross dam southerly to the shore, so as to make on one side of the cross dam a full basin, and on the other an empty or receiving basin, and to cut raceways from the full basin to the receiving basin, and to have the use of the land in the basins, derived partly from the Commonwealth and partly from individuals, either by purchase or by taking it for public use, at an appraisement; and to use, sell, or lease the water power thus created; and the corporation built the dams accordingly, and erected mills. It was held that it was within the constitutional power of the legislature to authorize a railroad corporation to construct their road across the basins, making compensation to the water-power corporation for the diminution and injury caused thereby to the water power. Also, that the grant of this authority to the railroad corporation could not be considered as annulling or destroying the franchise of the water-power corporation; and the right of the water-power corpora-

tion to use the land constituted an interest and qualified property therein not larger nor of a different nature from that acquired by a grant of land in fee, and did not necessarily withdraw it from a liability to which all lands in the commonwealth are subject, to be taken for public use, for an equivalent, when in the opinion of the legislature the public exigency requires it; and that the effect of the railroad act was merely to appropriate to another and distinct public use a portion of the land over which the franchise of the water-power company was to be used. The court also held that if the whole of a franchise should become necessary for the public use, the right of eminent domain would authorize the legislature to take it, on payment of a full equivalent. An act of the legislature, in the exercise of the right of eminent domain, appropriating to public use, on payment of a full equivalent, property or rights in the nature of property granted by the State to individuals, is not a law impairing the obligation of contracts, within the meaning of the Constitution of the United States. It was held that the act authorizing the railroad is not liable to the objection that it does not provide for compensation for the damage done to the franchise of the water-power corporation, for the franchise was not taken but only a portion of the land over which it extended, and for all damages occasioned by the taking of land the act makes provision. The act empowered the railroad corporation to locate and construct a railroad "in or near the city of Boston and thence to any part of the town of Worcester, in such manner and form as they should deem expedient." It was held that the act sufficiently declared the public necessity and convenience of the railroad and fixed the general *termini*, and that the delegation to the corporation of the power to fix the precise *termini* and the intermediate course between them, and thus to take private property for public use, did not render the act unconstitutional and invalid. Where a corporation

tion is a contract which the legislature cannot impair against their assent, does not preclude the legislature from taking their franchise

was empowered by the legislature, in general terms, to locate and construct a railroad between certain *termini*, and between these *termini* lay an extensive tract of land already appropriated, under the authority of the legislature, to a distinct public use, namely, for mill ponds, by another corporation, and this tract might be crossed by the railroad, with some diminution indeed of the mill-power, and which might be compensated in damages, but without essential injury, — it was considered that there was nothing in the nature of such public use, and in the extent to which it would be impaired or diminished, from which the power of constructing the railroad over it might be presumed to have been restrained by the legislature. It was held that if the water in the basins above mentioned was once a part of the Charles River, it ceased to be so after it was effectually separated by the dam and rendered unfit for the general purposes of navigation; and consequently, that a prohibition to the railroad corporation to build a bridge over the water of Charles River, connected with Boston, or to place any obstruction therein, was not intended to apply to the basins, but only to the waters of Charles River below the dam and open to navigation, and was designed mainly to protect this navigation. *Central Bridge Co. v. Lowell*, 4 Gray (Mass.), 482; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 529; *Matter of Kerr*, 42 Barb. (N. Y.) 119; *Noll v. Dubuque, &c. R. R. Co.*, 32 Iowa, 66; *Newcastle, &c. R. R. Co. v. Peru & S. R. R. Co.*, 3 Ind. 464; *Peoria, &c. R. R. Co. v. Peoria & Springfield R. R. Co.*, 66 Ill. 174; *Northern R. R. Co. v. Concord, &c. R. R. Co.*, 27 N. H. 183; *Enfield Toll Bridge Co. v. Hartford, &c. R. R. Co.*, 17 Conn. 40; *Chicago, &c. R. R. Co. v. Lake*, 71 Ill. 333; *Backus v. Lebanon*, 11 N. H. 19; *Greenwood v. Freight Co.*, 105 U. S. 13; *Lake Shore, &c. R. R. Co. v. Chicago & Western Indiana R. R. Co.*, 97 Ill. 506. A railroad company sought to condemn a right of way across the tracks of another company, and, pending the proceedings in the county court, the latter company sought

to enjoin by suit in equity their further prosecution. A decree was made, refusing the injunction and dismissing the bill, whereupon a writ of error was filed, and a motion made that the writ be made to operate as a *supersedeas*. It was held that the grounds in support of the motion could be interposed in defence to the condemnation proceedings, and that the court should refuse jurisdiction. *Lake Shore & Michigan Southern R. R. Co. v. Chicago & Western Indiana R. R. Co.*, 96 Ill. 125. As a general rule the courts will not interfere by injunction to restrain a railroad corporation from condemning a right of way across tracks of another corporation. There is no want of constitutional power in the legislature to provide for such condemnation; the public use contemplated is not the same use, and, although applied to public uses, the property so taken is, nevertheless, private property, and so within the power of eminent domain, and the courts of law afford an ample *forum* for the adjustment of the matter of compensation. *Lake Shore & Michigan Southern R. R. Co. v. Chicago & Western Indiana R. R. Co.*, 97 Ill. 506. In *Enfield Toll Bridge Co. v. Hartford, &c. R. R. Co.*, 17 Conn. 40, it was held that the franchise of the Enfield Toll Bridge Company, (aside from any special legislation regarding it), is subject to the same legislative control, for public use, as any other species of property; and that a provision in the charter that "no person or persons shall have liberty to erect another bridge anywhere between the north line of Enfield and the south line of Windsor," was not a covenant distinct from the franchise, but identical with it, and subject to the same laws; and that where the charter of a railroad company gave to the corporation, "all powers, privileges, and immunities, which are or may be necessary to carry into effect the purposes and objects" of the charter, it was the duty of the court to give the provisions of the charter such construction as will give them full effect, — by so treating the powers of the company as that it shall have the right, in a constitutional manner, to sequester both

and property for public use upon making compensation. Their powers and privileges, including everything which constitutes their fran-

land and water, to take property both corporeal and incorporeal, or to interfere with privileges which may lie in its way, for the necessary completion of the work which it was empowered to construct. And where the charter also provided, that the company should be held to pay all damages that might arise to any person or persons; and that freeholders should assess just damages to those whose real estate might be taken or injured,—it was held that a franchise issuing out of land was an incorporeal hereditament, which might be treated as real estate within the charter, and an injury done to it be the subject of assessment. It appeared in the case that in 1798, the General Assembly created a corporation, for the purpose of erecting and maintaining a bridge across Connecticut river between Enfield and Suffield, and granted to such corporation the right of taking certain tolls from persons going over or using the bridge, for the term of one hundred years, or until the cost of erecting the bridge should be reimbursed; and then provided that during said term of one hundred years, no person or persons should have liberty to erect another bridge anywhere between the north line of Enfield and the south line of Windsor. In 1835, the General Assembly created another corporation, with power to construct a railroad from the city of Hartford, by the most direct and feasible route, to the northern line of the State, and thence to Springfield. In the charter of this corporation, it was provided that if it should become necessary to erect a bridge across Connecticut river, it should be used exclusively for the railroad travel, and it should not be lawful for the corporation to permit any other passing thereon. It was also provided in the charter that nothing therein contained should be construed to prejudice or impair any of the rights then vested in the Enfield Bridge Company. The bridge company complied with the requirements of their charter, and were in the exercise of the rights granted, which had a pecuniary value; and the cost of erecting the bridge had not been reimbursed. Their bridge, how-

ever, was not so constructed or situated as to answer the purpose of a railroad crossing. The railroad company laid out the route of their road, with the approbation of the commissioners, across the Connecticut river, in the most direct and feasible route from Hartford to the north line of the State and thence to Springfield, between the north line of Enfield and the south line of Windsor; and were proceeding to erect a structure over the Connecticut river, at that place, for the purposes of their railroad, and for such purposes only, claiming the right so to do under the provisions of their charter, without making compensation to the bridge company. At this juncture the bridge company brought a bill in chancery against the railroad company, praying for an injunction, or other relief. During the pendency of the bill, the defendants completed the structure, and used it for the transportation of locomotives and cars, with passengers and freight. The plaintiffs then filed a supplemental bill, showing these facts, and praying the same relief as in their original bill. The structure in question was built much in the manner common to railroad bridges, and was adapted to and convenient for the passing of locomotives and cars, but not of common vehicles; though foot-passengers, when upon the railroad, could walk over it, in the daytime; but there was no public road or highway thereto, except the railroad. The defendants purchased the land on each side of the river, where this structure was. This was above tide water; but the river was there navigable for small flat-bottomed steamboats, and other boats of small draft. The erection and use of the bridge by the defendants had a tendency, in some degree, to divert the travel from the plaintiffs' bridge; but very little, however, if any, more than it would, if it had been placed a little above or below the protected part of the river. It was held that the structure of the defendants is a "bridge," and "another bridge," within the meaning of the plaintiffs' charter. That the erection and use of such bridge by the defendants, without



chise, are held and enjoyed in the same manner and by the like tenure as all other property and rights under our constitution and

compensation to the plaintiffs, was a violation of their grant; and if the charter of the defendants purported to authorize such acts, it was, so far, unconstitutional and void, as impairing the obligation of a contract. But see *contra*, *Lake v. Virginia, &c. R. R. Co.*, 7 Nev. 294; *Bridge Co. v. Hoboken Land, &c. Co.*, 13 N. J. Eq. 81; *aff'd* 1 Wall. (U. S.) 116; *Piatt v. Covington, &c. Bridge Co.*, 8 Bush (Ky.), 31. That a railroad, though granted to a private company, is "for public use," within the meaning of the Constitution; and the taking of private property for that use ought to be accompanied with compensation. That the franchise of a toll-bridge company, is "private property," within the meaning of the Constitution; and a legislative provision authorizing an injury to such franchise, for public use, upon compensation made, is not unconstitutional. That the acts of the defendants in this case were not authorized by the facts that the site of their bridge was above tide water, and that they owned the land on both sides of the river. That these acts could not be vindicated on the ground that the bridge of the defendants was exclusively adapted to, and used for, the passage of their engines and cars; nor on the ground that there was no appreciable damage resulting therefrom to the plaintiffs. That although the court could not restrain the defendants from building the bridge, according to the specific prayer of the original bill, yet it would, under the general prayer, pass a decree in favor of the plaintiffs, affording relief adapted to the whole case.

The authority to take private property for public purposes is a right inherent in the government. *Varick v. Smith*, 5 Paige (N. Y.), Ch. 137; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Backus v. Lebanon*, 11 id. 19. And in this respect corporations, either public or private, have no rights superior to individuals. *Bradley v. N. Y. & New Haven R. R. Co.*, 21 Conn. 306; *Armington v. Barnet*, 15 Vt. 745. *And both their franchises and their property may be taken for the use of another, when the right*

*is given either expressly or by necessary implication.* *Bridgeport v. N. Y. & New Haven R. R. Co.*, 36 Conn. 255. And the exercise of this right is not, if provision for compensation is made, in any sense a violation of the obligations of a contract. In *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, DANIEL, J., said: "Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body organized in such mode or exerted in such way as the community or State may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only in the original nature of tenure that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis the law of property would be simply the law of force. Now it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control as conditions inherent and paramount wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest

laws, and they can claim no special exemption or privilege therefor. It is subject to the same sovereign right of eminent domain by

extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the Constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It then being clear that the power in question not being within the purview of the restriction imposed by the 10th section of the first article of the Constitution, it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the Constitution, — shall avoid interference with the obligation of contracts, — the wisdom, the mode, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and conceding the power to reside in the State government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power in some mode or other from the very foundation of civil government have been so numerous and familiar, that it seems somewhat strange at this day to raise a doubt or question concerning it. In fact, the whole policy of the country, relative to roads, mills, bridges, and canals, rests upon this single power under which lands have been always condemned; and without the exertion of this power not one of the improvements just mentioned could be constructed. In our country it is believed the power was never, or at any rate rarely, questioned; until the opinion seems to have obtained

that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen, — an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons resting upon the ordinary foundations of private right there would seem to be room neither for doubt nor difficulty. A distinction has been attempted in argument between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons in the use or enjoyment of their private property to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred than other property. A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating in his second volume, c. 3, p. 26, of the 'Rights of Things.' It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyments. *Vide* Bl. Comm. vol. 3, c. 16, p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them granted by the authority of the State, we regard as occupying the same position with respect to the paramount power and duty of the State to promote and protect the public good as does the right of the citizen to the possession and

which the property and rights of all subjects and individuals are liable to be taken and appropriated to a public use, in the manner provided in the Constitution, whenever the legislature shall deem that the public exigencies require it. Thus, a franchise to build and maintain a bridge and take tolls thereon, may be taken for a highway,<sup>1</sup> and a highway may be taken for a railway;<sup>2</sup> one railway may be taken for the use of another,<sup>3</sup> or for the purposes of a highway,<sup>4</sup> or indeed for any public use.<sup>5</sup> But the condemnation of lands

enjoyment of his land under his patent or contract with the State, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution and no violation of a contract. The power of a State in the exercise of eminent domain to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England this power, to the fullest extent, was recognized in the case of the Governor and Company of the East India Company v. Meredith, 4 T. R. 794; and Lord KENYON, especially in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom." *Central Bridge Co. v. Lowell*, 4 Gray (Mass.), 682; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 454; *White River Turnpike Co. v. Vt. Central R. R. Co.*, 21 Vt. 590; *Baltimore Turnpike v. Union R. R. Co.*, 35 Md. 224; *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray (Mass.), 1; *Richmond R. R. Co. v. Louisiana R. R. Co.*, 13 How. (U. S.) 71; *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.), 176; *Boston Water Power Co. v. Boston R. R. Co.*, 23 Pick. (Mass.) 360; *Barber v. Andover*, 8 N. H. 398; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Eastern R. R. Co. v. Boston & Maine R. R. Co.*, 111 Mass. 125; *Matter of Kerr*, 42 Barb. (N. Y.) 119; *Chicago, &c. R. R. Co. v. Lake*, 71 Ill. 333. The legislature has no power to take the property of one corporation and give it to another, but must in all cases provide for proper compensation to be paid. Thus, a statute authorizing a

telegraph company to set its poles and erect its line upon lands of a railroad, without providing for enforcing payment of damages, was held unconstitutional and void. *South Western R. R. Co. v. Southern Tel. Co.*, 46 Ga. 4.

<sup>1</sup> *Pierce v. Somersworth*, 10 N. H. 370, 11 N. H. 20; *Crosby v. Hanover*, 36 N. H. 404; *James River & Kansas Co. v. Thompson*, 3 Gratt. (Va.) 270; *Newcastle R. R. v. P. & J. R. R.*, 3 Ired. (N. C.) 461; *Tuckahoe Canal Co. v. T. & James River R. R. Co.*, 11 Leigh (Va.), 42; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 Baldw. (U. S. C. C.) 205; *Boston, &c. R. R. Co. v. Salem, &c. R. R. Co.*, 2 Gray (Mass.), 1; *Springfield v. Conn. River R. R. Co.*, 4 Cush. (Mass.) 63; *Central Bridge Co. v. Lowell*, 4 Gray (Mass.), 474; *Northern R. R. Co. v. Claremont, &c. R. R. Co.*, 27 N. H. 183; *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.), 176; *Barber v. Andover*, 8 N. H. 398; *Armington v. Barnett*, 15 Vt. 745; *Backus v. Lebanon*, 11 N. H. 19.

<sup>2</sup> *Boston Water Power Co. v. Boston, &c. R. R. Co.*, 23 Pick. (Mass.) 360.

<sup>3</sup> *Oregon Cascade R. R. Co. v. Bailey*, 3 Oregon, 164; *Northern R. R. Co. v. Concord, &c. R. R. Co.*, 27 N. H. 183; *Eastern R. R. Co. v. Boston & Maine R. R. Co.*, 111 Mass. 125; *Com. v. Dickinson*, 9 Phila. (Penn.) 561; *Oakland R. R. Co. v. Oakland, &c. R. R. Co.*, 45 Cal. 365; *Sixth Avenue R. R. Co. v. Kerr*, 72 N. Y. 330.

<sup>4</sup> *Philadelphia, &c. R. R. Co. v. Philadelphia*, 47 Penn. St. 325; *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; *Old Colony, &c. R. R. Co. v. Plymouth*, 14 Gray (Mass.), 144; *Chicago, &c. R. R. Co. v. Lake*, 71 Ill. 333; *Com. v. Essex County*, 13 Gray (Mass.), 239.

<sup>5</sup> *Metropolitan City R. R. Co. v. Chi-*

owned by one railroad company, but not used for railroad purposes, by another company for use in the construction of a railroad, is unavailing to condemn the franchises of the former. All that is acquired is a right of way, and, incidentally, the power to cross the track of the former where the routes of the two roads cross.<sup>1</sup> The taking of the franchise or property of one corporation for the use of another is not a repeal of its charter, but an enforced purchase of its property.<sup>2</sup> Nor can it in any sense be said to operate as a violation of the obligations of a contract, because all contracts are subject to certain implied conditions; and unless expressly exempted therefrom, franchises are as much subject to condemnation by the sovereign power as any other.<sup>3</sup> The property of a corporation may be condemned in whole or in part,<sup>4</sup> and the franchise still remain in the company; and in such a case only the value of the property is to be estimated; and if the franchise only is taken, the value of the property should not be included.<sup>5</sup> In considering the right of one company to condemn and use the property of another company, it makes no difference which is the elder company. If the elder company has exercised its power to condemn property for its right of way, and has constructed and is operating its road, that does not withdraw its property from the equal power of condemnation of its right of way for a crossing, to be enjoyed in common by a junior company. The right to cross is equal, and does not arise out of

cago, &c. R. R. Co., 87 Ill. 317; Baltimore, &c. T. Co. v. Union R. R. Co., 35 Md. 224; State v. Eastern, &c. R. R. Co., 36 N. J. L. 181; Grand Junction R. R. Co. v. County Commissioners, 14 Gray (Mass.), 553; Sixth Avenue R. R. Co. v. Kerr, 45 Barb. (N. Y.) 138; Massachusetts Central R. R. Co. v. Boston, &c. R. R. Co., 121 Mass. 124; Lake Shore, &c. R. R. Co. v. Cincinnati, &c. R. R. Co., 30 Ohio St. 604; Newcastle, &c. R. R. Co. v. Peru, &c. R. R. Co., 3 Ind. 464; Alabama, &c. R. R. Co. v. Kenney, 39 Ala. 307; Union Pacific, &c. R. R. Co. v. Burlington, &c. R. R. Co., 3 Fed. Rep. 106; Northern Pacific R. R. Co. v. St. Paul, &c. R. R. Co., 3 Fed. Rep. 702; Towanda Bridge Co., *in re*, 37 Leg. Int. (Penn.) 389; Lexington, &c. R. R. Co. v. Applegate, 8 Dana (Ky.), 289; Kerr's Case, 42 Barb. (N. Y.) 119; Com. v. Pittsburgh, &c. R. R. Co., 58 Penn. St.

26; Com. v. Penn. Canal Co., 66 Penn. St. 41; Crosby v. Hanover, 36 N. H. 404.

<sup>1</sup> State v. Easton, &c. R. R. Co., 36 N. J. L. 181.

<sup>2</sup> State v. Hudson Tunnel Co., 38 N. J. L. 548; Grand Junction R. R. Co. v. Middlesex, 14 Gray (Mass.), 553.

<sup>3</sup> Richmond R. R. Co. v. Louisa R. R. Co., 13 How. (U. S.) 71; Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176; Central Bridge v. Lowell, 4 Gray (Mass.), 474; Barber v. Andover, 8 N. H. 398; Armington v. Barnet, 15 Vt. 745; James River Co. v. Thompson, 8 Gratt. (Va.) 170; Salem Turnpike Co. v. Lyme, 18 Conn. 451.

<sup>4</sup> Worcester R. R. Co. v. Commissioners, 118 Mass. 561; Sixth Avenue R. R. Co. v. Kerr, 45 Barb. (N. Y.) 138; Jersey City, &c. R. R. Co. v. Jersey City Horse R. R. Co., 20 N. J. Eq. 61.

<sup>5</sup> Central Bridge v. Lowell, *ante*.

purchase. When the younger corporation has acquired its right of property in common with the older in a crossing, they become joint and equal owners, bound by mutual obligations to each other and to the public to so use this common right as to do no unnecessary harm to the other or to the public. It may be provided that all railroad crossings shall be made, kept up, and watchmen maintained at the joint expense of the companies, without regard to the priorities of either in the location and construction of its road. The elder company does not possess any paramount or vested privilege to operate its road over that of the younger. Nor can it impose all the burdens of maintaining this crossing upon the road last constructed. When the appropriation is made, paid for, and put to the new use, both companies stand on a perfect equality as to the rights and privileges in the use of the crossing.<sup>1</sup>

Land already taken by the exercise of eminent domain may be taken by legislative authority for other public uses; and when so taken, it is presumed that the former use has ceased, or become detrimental,<sup>2</sup> or relatively of less importance.<sup>3</sup> It is not presumed that roads will be laid lengthwise of a right of way, unless it is shown that no other practical route could be had.<sup>4</sup> Railroads entering towns are subject, under the general authority given to towns and counties, to have roads and streets laid across their tracks. The franchise is taken subject to any inconvenience that may arise from such opening.<sup>5</sup> Railroads and canals must allow improvements subsequently authorized to cross or tunnel their rights of way, on reasonable terms and proper compensation.<sup>6</sup> A franchise which is subject to forfeiture is valid until forfeited by some action on the part of the State, and the property of such corporation is still protected by the Constitution, and must be paid for according to its proper value.<sup>7</sup>

But a franchise cannot be taken under the general law, *but must have for its basis express legislative authority*,<sup>8</sup> or *must arise from necessary*

<sup>1</sup> Lake Shore R. R. v. Cincinnati R. R., 30 Ohio St. 604.

<sup>2</sup> Miller v. Craig, 11 N. J. Eq. 175.

<sup>3</sup> Talbot v. Hudson, 16 Gray (Mass.), 417; Miller v. Craig, 11 N. J. Eq. 175.

<sup>4</sup> Crossley v. O'Brien, 24 Ind. 325.

<sup>5</sup> Hannibal v. Hannibal R. R., 49 Mo. 480; New Orleans v. United States, 10 Pet. (U. S.) 662; Philadelphia R. R. v. Philadelphia, 9 Phila. (Penn.) 563; Little Miami R. R. v. Dayton, 23 Ohio St. 510.

<sup>6</sup> Illinois Canal v. Chicago R. R., 14 Ill. 314; Richmond R. R. v. Louisa R. R., 13 How. 71; Northern R. R. v. Concord R. R., 27 N. H. 183; Brooklyn Central R. R. v. Brooklyn City R. R., 33 Barb. (N. Y.) 420; Glover v. Powell, 10 N. J. Eq. 211.

<sup>7</sup> White v. South Shore R. R., 6 Cush. (Mass.) 412.

<sup>8</sup> In re Boston & Albany R. R. Co., 53 N. Y. 574; Central City Horse R. R. Co. v.

*implication*.<sup>1</sup> But this rule must be understood as only applying in the case of public, or *quasi* public corporations,<sup>2</sup> as the property

Fort Clark Horse R. R. Co., 81 Ill. 523. In the case *Matter of the City of Buffalo*, 68 N. Y. 167, the definition of implication is given, and the construction which must be placed on statutes claimed to confer power by implication. The court say: "An implication is an inference of something not directly declared, but arising from what is admitted or expressed. In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded by the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid; if the latter use, when exercised, must supersede the former; it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise, to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter of it, so that, by reasonable intendment, some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner." In this case, the city proposed to excavate a canal sixty feet in width across the tracks of several railroads, and entirely through the yard of one of them, at a place where there are

numerous tracks, turn-outs, and switches. The present grade of these tracks was but a few feet above the natural level of the canal. The land, if taken by the city, would be taken in fee, and hence the railroad companies would have no right to bridge the canal, and the bridging, if done, would be at an immense expense. This interference, the court say, would not be a tolerable interference with an existing public use, which may be compensated for in damages, but an entire superseding of it by another public use. Both uses cannot stand together. It is not to be presumed that the legislature, by the general terms in which it gave power to the city to take lands, with no especial reference to this particular place or occasion, meant to produce such an effect.

A general authority to lay out streets and alleys will not justify the laying-out of a street across depot grounds, when the easement of the railroad company and of the city cannot reasonably coexist. *Milwaukee R. R. v. Faribault*, 23 Minn. 167. In many States the condemnation of private property for public use is governed by general laws. No restriction on routes is imposed by the acts, and conflicts have frequently arisen. Land already devoted to another public use cannot be taken, under general laws, where the effect would be to extinguish a franchise. If, however, the taking would not materially injure the prior holder, the condemnation may be sustained. *New York R. R. Co. v. Metropolitan Gas-light Co.*, 63 N. Y. 326; *Morris R. R. Co. v. Central R. R. Co.*, 31 N. J. L. 205. Or if the property sought to be condemned was not in use, or absolutely necessary to the enjoyment of the franchise. *Peoria R. R. Co. v. Railroad Co.*, 66 Ill. 174; *Oregon R. R. Co. v. Bailey*, 3 Oreg. 164. A corporation, either private or municipal, cannot, under a general power to take lands for a public use, take from another corporation, having the like power, lands or property held by it for a public purpose

<sup>1</sup> CARPENTER, J., in *Evergreen Cemetery Assn. v. New Haven*, 36 Conn. 242.

<sup>2</sup> *In re Boston & Albany R. R. Co.*, 53 N. Y. 574.

of *any* purely *private* corporation may be taken *in invitum*, the same as that of an individual;<sup>1</sup> and the same is also true as to lands of public or *quasi* public corporations not in use, and which can be taken without detriment to the public, or interfering with the use to which they are devoted,<sup>2</sup> *and where there is a necessity for*

pursuant to its charter. But an easement may be acquired *in invitum*, by legislative authority, in lands held and occupied for a public use, when such easement may be enjoyed without detriment to the public or interfering with the use to which the lands are devoted. Lands held simply as a proprietor, but not used or necessary to the public purpose, may be taken as of a private person. *Matter of Rochester Water Commissioners*, 66 N. Y. 413. Property abandoned by a former corporation may be taken. The taking is not a forfeiture of the franchise, for the State alone can declare such forfeiture; but the land may be taken because not necessary to the old corporation, and because one company cannot condemn and hold land not necessary or convenient for its business, merely to prevent a rival company from competing with it. *Oregon R. R. Co. v. Bailey*, 3 Oreg. 164. A portion of a horse railroad which constitutes the most valuable portion of the road cannot be condemned under a general law. A crossing may properly be made, but the condemnation should be of the whole road, and not of the most valuable portion of it. *Central City Horse R. R. Co. v. Ft. Clark Horse R. R. Co.*, 81 Ill. 523. When different corporations desire the same location, the one that is prior in point of time is also prior in point of right, and the first location, if followed by construction, operates to secure the prior right. *Waterbury v. Dry Dock R. R. Co.*, 54 Barb. 388; *The People v. New York R. R. Co.*, 45 Barb. 73. And unless an exclusive right is given to a particular route, the company which files the first survey is entitled to the route. It does not signify that because the articles of incorporation of one are prior in date to those of the other, or that one has made preliminary surveys over a particular route, or has made purchases of individuals along that route, it has acquired a prior right. Until the survey is made and filed, the company would hold

the land purchased as any other individual land-owner, and such land could be condemned by the rival company upon compensation. *Morris R. R. Co. v. Blair*, 9 N. J. Eq. 635. The priority of construction gives no rights where another company has perfected its location first. *Chesapeake Canal Co. v. Baltimore R. R.*, 4 Gill & J. (Md.) 1. A right of way taken and occupied by one road cannot be taken by another, by a general proceeding, without stating in the petition that the land was occupied by another company, and without showing any necessity for taking that particular land. *Cincinnati R. R. Co. v. Danville R. R. Co.*, 75 Ill. 113; *San Francisco Water Co. v. Alameda Water Co.*, 36 Cal. 639. The commissioners who assess the damages cannot determine the priority of right, *San Francisco Water Co. v. Alameda Water Co.*, 36 Cal. 639, nor can the owner raise questions of priority between the two companies claiming the land, under separate proceedings, to defeat condemnation. *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *Mills Eminent Domain*, §§ 46, 47.

<sup>1</sup> *White River Turnpike Co. v. Vt. Central R. R. Co.*, 21 Vt. 590; *Grand Junction R. R. Co. v. Middlesex*, 14 Gray (Mass.), 553; *State v. Hudson Tunnel Co.*, 38 N. J. L. 548; *Bellona Company's Case*, 3 Bland (Md.), 442; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Trustees v. Salmon*, 11 Me. 109; *Peoria, &c. R. R. Co. v. Peoria & S. R. R. Co.*, 66 Ill. 174.

<sup>2</sup> *Matter of Rochester Water Works*, 66 N. Y. 413; *Matter of New York Central, &c. R. R. Co.*, 63 N. Y. 326. Lands held by a railway company for other than railway purposes may be taken *in invitum*. *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; *Peoria, P. & J. R. R. Co. v. Peoria, &c. R. R. Co.*, 66 Ill. 174; *In re Rochester Water Commrs.*, 66 N. Y. 413; *In re Ninth Av.*, 45 id. 729. *In Eastern R. R. Co. v. Boston & Maine R. R. Co.*, 111 Mass. 125, it

*taking such lands for the purpose for which they were taken*; <sup>1</sup> and the question as to whether such necessity exists or not is one of fact for the jury.<sup>2</sup> The rule may perhaps be better stated thus: One public corporation cannot take the lands or franchises of another public corporation *in actual use by it*, unless *expressly authorized to do so* by the legislature; but the lands of such a corporation, not in actual use, may be taken by another corporation, authorized to take lands for its use *in invitum*, whenever the lands of an individual may be so taken, subject to the qualification that there is a *necessity* therefor.

was held that the legislature had the right to authorize one railroad to take the land of another railroad which it had acquired by eminent domain, upon payment of compensation; and the same rule was followed in *Chicago, &c. R. R. Co. v. Town of Lake*, 71 Ill. 333; *New York, &c. R. R. Co. v. Boston, &c. R. R. Co.*, 36 Conn. 196; *City of Bridgeport v. New York, &c. R. R. Co.*, id. 255; 4 Am. Rep. 63; *Evergreen Cemetery Assoc. v. New Haven*, 43 Conn. 234; *Matter of Kerr*, 42 Barb. 119; *Backus v. Lebanon*, 11 N. H. 19. But to authorize the taking of land already actually devoted to a public use there must be an express statutory authority. *In re Boston & Albany R. R. Co.*, 53 N. Y. 574. Thus, in *Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co.*, 81 Ill. 523, it was held that a part of the line of one railroad could not be taken by a competing road acting under an ordinance of a city council. So, in *Evergreen Cemetery Assoc. v. New Haven*, 21 Am. Rep. 643, 43 Conn. 234, it was held that, without special statutory authority, or necessary and reasonable implication, a municipal corporation could not take for a highway the land of a cemetery, whether such land was actually in use for interments or not. But in *Matter of New York Central, &c. R. R. Co.*, 63 N. Y. 326, it was held that, under the general statute, a railroad could take the land of a gas-light company not in actual use, such company not being a public corporation. In *Matter of Rochester Water Commissioners*, 66 N. Y. 413, the court said: "An easement may be acquired *in invitum*, by legislative authority, in lands held and occupied for a public use when such easement may be enjoyed without detriment to the public or interfering with

the use to which the lands are devoted. *New York Central & Hudson R. R. Co. v. Metropolitan Gas-light Co.*, 63 N. Y. 326. So, too, lands held by a corporation or by a public body, but not used for or necessary to a public purpose, but simply as a proprietor and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner. The property rights of a corporation in lands not held in trust for a public use are no more sacred than those of individual proprietors. The law only protects from condemnation for public purposes lands actually held by authority of the sovereign power for or necessary to some public purpose or use. Lands held upon a special trust for a public use cannot be appropriated to another public use without special authority from the legislature." In *Peoria, &c. R. R. Co. v. Peoria, &c. R. R. Co.*, 66 Ill. 174, it was held that the land of one railroad company not in actual use might be condemned,—"clearly implying," said BREESE, J., in *Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co.*, 81 Ill. 523, "if it was in actual use for their track or appurtenances, that it was not subject to condemnation by another road." But in no case can the right be exercised without compensation. Thus, in *Southwestern R. R. Co. v. Southern Telegraph Co.*, 12 Am. Rep. 585, 46 Ga. 4, a statute authorizing a telegraph company to erect its lines upon the way of a railroad company, without providing for enforcing payment of damages, was held unconstitutional and void.

<sup>1</sup> *Evergreen Cemetery Assoc. v. New Haven*, *ante*.

<sup>2</sup> *Bowler v. Perrin*, 47 Mich. 154.



This rule was adopted and ably upheld in a Connecticut case.<sup>1</sup> In that case the plaintiffs, a cemetery association formed under the gen-

<sup>1</sup> *Evergreen Cemetery Assoc. v. New Haven*, 43 Conn. 234. In *Baltimore, &c. R. R. Co. v. P. W. & Kentucky R. R. Co.*, 17 W. Va. 812, the defendants, by proceedings *in invitum*, took a part of the buttress of the plaintiff's bridge, erected by it across Wheeling Creek. It appeared that the portion taken was not necessary to the support of the bridge and the exercise of the franchise of the company. The court held that its condemnation was proper. JOHNSON, J., in a masterly opinion, reviewed the cases, and said: "It is a mistake to suppose that land in use for certain purposes by a railroad company is not liable to condemnation. Pleas numbers two and three did not so much as aver that the lands were in present use, and they were, of course, properly rejected. There is nothing so sacred in the title of a railroad company to property that it cannot be taken under the exercise of the right of eminent domain. I understand the law to be, that property belonging to a railroad company, *and not in actual use*, or necessary to the proper exercise of the franchise thereof, may be taken for the purposes of another railroad under the general railroad law of the State. An express legislative enactment is generally required in order to take such property in use by a railroad company, except where the proposed appropriation would not destroy or greatly injure the franchise of the company, or render it difficult to prosecute the object thereof. If such consequences would not follow, a general grant is sufficient. *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 40; *Little Miami R. R. Co. v. Day*, 23 Ohio St. 510; *Tuckahoe Canal Co. v. T. R. Co.*, 11 Leigh (Va.), 79; 3 Gratt. (Va.) 258. In *Richmond, &c. R. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 71, it appeared that the legislature of Virginia incorporated the Richmond, Fredericksburg, & Portsmouth R. R. Co., and in the charter pledged itself not to allow any other railroad to be constructed between the places, or on any portion of that distance, the probable effect of which would be to diminish the number of passengers

travelling between the one city and the other upon the railroad authorized by that act, or to compel the said company, in order to retain such passengers, to reduce the passage money. Afterwards the legislature incorporated the Louisa R. R. Co., whose road came from the west and struck the first-named company's track nearly at right angles at some distance from Richmond; and the legislature authorized the Louisa road to cross the track of the other and continue their road to Richmond. The court held that in the last grant the obligation of the contract with the first company was not impaired within the meaning of the Constitution of the United States; that in the first charter there was an implied reservation of the power to incorporate companies to transport other articles than passengers; that a franchise could be condemned in the same manner as individual property. *West Bridge Co. v. Dix et al.*, 6 How. (U. S.) 507. In *Grand Rapids, &c. R. R. Co. v. Grand Rapids & Indiana R. R. Co.*, 35 Mich. 265, it was held that one railroad has no right to appropriate without compensation the franchise or property of another for the construction of its road. The fact that property has been taken for a particular public use does not make it public property for all purposes; and the property rights of a railroad company in its right of way are protected by the same restrictions against appropriation by any other railroad company for railroad purposes or other public use as is afforded by the Constitution and laws in the case of the private property of an individual. *Baltimore & Havre de Grace Transportation Co. v. Union R. R. Co.*, 35 Md. 224. It is insisted by counsel for plaintiff in error that where a corporation is authorized by its charter or a general law to take by condemnation the land required for its purposes, it cannot, under such general authority, condemn property already appropriated to public use by another corporation; that to authorize it to do so, the power must be granted to it by express terms, or by necessary implication. For this position they rely upon *B. & M.*

eral laws of the State, owned certain lands in New Haven, which had been acquired by it under its charter for a burial-ground, and

R. R. Co. v. L. & L. R. R. Co., 124 Mass. 368; Housatonic R. R. Co. v. Lee & Hudson River R. R. Co., 68 N. Y. 391; Evergreen Cemetery Association v. New Haven, 43 Conn. 234; Matter of B. & A. R. R. Co., 53 N. Y. 574; Matter of City of Buffalo, 68 N. Y. 167. In the case in 124 Mass., it appeared that the location of the proposed extension of the defendant's railroad, of which the plaintiff complained, was twenty-six feet wide, and crossed upon a level two branches of the plaintiff's railroad, about a quarter of a mile apart; and at these crossings, and for the whole distance between them, was, for a small portion of its width, upon the plaintiff's depot and station grounds; but, for the greater part of its width, was along and within the plaintiff's location of 1847, and included a great part of the signal houses, of the store house, of the paint shop, and of the carpenters' shop, and of the freight platform; that the construction of the proposed extension of the defendant's road would be a serious injury to the plaintiff, and would greatly interfere with its necessary use of the tracks, signal houses, etc. The court, in its opinion, quoted with approbation what had been said in the case in 118 Mass.,—that 'a charter to build and maintain a railroad between certain points, without describing its course and direction, but leaving that to be determined and established by the corporation, as provided by the general laws, does not *prima facie* give any power to lay out the road over land already devoted to and within the recorded location of another railroad. It is not to be presumed that the legislature intended to allow land thus devoted to one public use to be subjected to another, unless the authority is given in express words, or by necessary implication.' In the case in 68 N. Y., it was held that 'the legislature may interfere with property held by a corporation for one public use and apply it to another, and may delegate the power so to do to another corporation; but such delegation must be in express terms, or arise from necessary implication. In determining whether a power to take lands given

in general terms was meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior use, and the extent to which it will be impaired or diminished by the taking for the subsequent use. A legislative intent to subject lands devoted to a public use, already in exercise, to one which might thereafter arise, will not be implied from a gift of power made in general terms without having in view a then existing and particular need for the subsequent use,—at least where both uses cannot stand together, and the latter, if exercised, must supersede the former.'

It will be observed that in these last cases the interference with the franchise was great, and much injury would have been sustained by the companies if their property had been taken. But the taking of a portion of a buttress might inflict no injury at all upon the Baltimore & Ohio R. R. Co. The courts will take care to see that one railroad company is not materially injured for the benefit of another; and where no such material injury will result, the onward march of improvement demands that a great work of internal improvement shall not be impeded by imaginary injury to another corporation. The instruction was properly refused. It is assigned as error that the court refused to set aside the verdict and grant a new trial. Upon a careful examination of the evidence, we think it fully sustains the verdict. But it is insisted by counsel for the plaintiff in error that the evidence shows that more land was included in the upper parcel of land sought to be condemned than was necessary for the purposes of petitioner, and the verdict ought therefore to be set aside. It is true, as contended by the counsel, that private property can only be taken for a public use, and no more of such property can be taken than is necessary for such use, which must be determined when proper from the statute upon the subject and the facts appearing in the case. Therefore, when it clearly appears that the property taken, or a part thereof, is not necessary for the public

were laid out and used by it for that purpose. In 1873 the city of New Haven, in pursuance of its corporate powers or otherwise, ordered the widening and straightening of Winthrop Avenue between certain points; and for that purpose took a portion of the plaintiff's land bordering on the avenue, about eight feet in width, covered with shrubbery, evergreens, and other ornamental trees. The land was shown to be in *actual use* by the association and *necessary* for its purposes, but was not shown to be necessary for the purposes of widening the avenue. CARPENTER, J., in the course of his opinion upon the question whether the defendants could take the land for the purposes named, said: "The power which the city has to take the land is the same as that conferred by general statute upon towns, there being no special power granted to take any part of this cemetery for such purposes. The petitioners are incorporated under the statute authorizing and regulating the organization of associations for the purpose of procuring and establishing burying grounds or places of sepulture. The association holds the land comprising the cemetery, subject to the provisions of the law authorizing its organization, and it is now held by the association, except

use for which such condemnation is sought, as to such part the taking is unlawful. *Matter of Albany Street*, 11 Wend. (N. Y.) 149; *Dunn v. Charleston*, Harp. (S. C.) 189; *Buckingham v. Smith*, 10 Ohio, 288. But does it appear in this record that more land was condemned than was necessary for the public use set forth in the petition? The only evidence before the jury on that subject was brought out on the cross-examination of the engineer of the petitioner, who said: 'For any structure which petitioner would put on the parcel of land just south of Wheeling Creek, it would only need twelve and one-half feet on each side of its centre line. For the remainder of the parcel west of this twenty-five feet petitioner had no immediate use, and witness could not say that it would ever be useful. It was one of those cases where railroads sometimes condemn all of the ground that is rendered useless to the former owner. In cases where the remainder of the ground was cut off from connection with the adjacent land, and where the damages for crossing amounted to as much as the whole

land was worth, it was just as well to take the whole.' Whether the whole of the upper parcel south of Wheeling Creek was necessary for the use of petitioner was not an issue before the jury. The petition particularly described it, and claimed that it was necessary for the use of the petitioner, which was a public use. The defendant, in the county court, did not take issue on that allegation in the petition. The only issues as to that parcel were, 'that the land last hereinbefore mentioned was, at the time of the beginning of the said condemnation proceedings, and still is, held and owned by the said defendant for the purpose of being used in its said business, and was at the time of the beginning of said proceedings, and still is, in use by the said defendant in its said business; and that in following the general course of the petitioner's road it is not necessary for the said petitioner to build its said line of road over said last-mentioned land.' Therefore it is clear that the evidence is not responsive to any issue before the jury."

such parts thereof as have been sold to be used and occupied as places of burial, which comprise a large part thereof.

"It is further found that the land so taken is needed for the purposes of the cemetery, and is not needed for the purpose of widening and straightening Winthrop Avenue. The use of land for a burying-ground is a public use, and, for such a purpose it may be taken, if need be, under the right of eminent domain. The fact that this land is held and used under a deed from the former owner, and was not taken by proceedings *in invitum*, cannot affect the nature of the use. It is held by as high and sacred a tenure as it would have been if the sovereign power of the State, in the exercise of the right of eminent domain, had been called to the aid of the petitioners in acquiring it. The question then is, whether land already devoted to a public use can be taken by the public for another use which is inconsistent with the first, without special authority from the legislature, or authority granted by necessary and reasonable implication. There are cases in which it would seem that lands used for a burying-ground, have been taken by the municipal authorities for highway purposes.<sup>1</sup> But whether they were taken under a general or special authority does not appear; nor does it appear that there was a necessity for taking them in order to exercise the powers granted; but it does appear that the question whether the public had a right so to take them without the consent of the owners, was not made and decided in either of the cases referred to.

"That the legislature has the power to authorize the taking of land already applied to one public use, and devote it to another is unquestionable.<sup>2</sup> And this power may be granted either by express words or by necessary implication. When the power is granted to municipal or private corporations in express words, no question can arise. In this case it is not claimed that the respondents were expressly authorized to take the petitioners' land. The question then arises whether, by a reasonable construction of the statute authorizing the respondents to lay out streets and highways, they had the power to take any portion of the petitioners' land for that purpose. The language is general and broad enough to embrace all lands, whether used for one purpose or another; nevertheless, there are cases in which it will be presumed that the legislature intended that it should not apply. It will be

<sup>1</sup> In the Matter of Albany Street, 11 Worcester R. R. Co., 23 Pick. Mass. 360; Wend. (N. Y.) 149; in the Matter of Springfield v. Conn. R. R. Co., 4 Cush. Beekman Street, 4 Bradf. (N. Y. Surr.) 503. (Mass.) 63; Bridgeport v. New York &

<sup>2</sup> Boston Water Power Co. v. Boston & New Haven R. R. Co., 36 Conn. 255.

presumed that land applied to one public use should not be taken and devoted to another use inconsistent with the first unless there is a necessity for it. Thus, it will be presumed that the legislature did not intend to authorize a town to lay out a highway along the track of a railway, or along the bed of a canal, as the two uses cannot well exist together. The one necessarily excludes the other. So also a railroad company, unless expressly authorized, cannot lay its track upon a highway; and when permitted, except in special cases, a substitute road must be provided. On the other hand, a highway may cross a railroad or a canal, as there is a manifest necessity for it, and it may be done without destroying the franchise, in whole or in part, and without seriously interfering with its exercise.

“The same land cannot properly be used for burial-lots and a public highway at the same time. The two uses are inconsistent with each other. *Land, therefore, applied to one use, should not be taken for the other, except in cases of necessity.* That brings us to inquire whether the necessity exists in the present case. The facts show that it not only does not exist but that there is hardly an apology for taking the land in question. If taken, it renders a very large number of lots in the cemetery inaccessible to carriages. That inconvenience can be remedied only by making a new avenue. That can only be done by taking six lots sold to private parties, all of which have been actually used for burial purposes. How the association is to acquire the title to those lots unless the owners voluntarily part with it, it is not easy to see. On the contrary, there is no difficulty in effecting the desired improvement by taking land on the other side of the street. . . . It can make no difference that the part taken was used for shrubbery and a carriage-way. A cemetery includes lots not only for depositing the bodies of the dead, but also avenues, walks and grounds for shrubbery and ornamental purposes. All must be regarded alike as consecrated to a public and sacred use. The idea of running a public street, regardless of graves, monuments, or the feelings of the living, through one of our great public cemeteries, would be shocking to the moral sense of the community, and would not be tolerated except upon the direst necessity. Yet the right to do so must be conceded, if the action of the respondents in the present case can be vindicated. The right to take a part of a cemetery, implies the right to take another, and the right to take one part implies the right to take the whole.” The action of the defendant in taking the land was declared null and void.

To justify an interference with a vested franchise by granting another to a rival company, upon the ground that it is taking the former franchise under the right of eminent domain, it must appear that the government intends to exercise this sovereign right, by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the statute that they recognize the right of private property and mean to respect it, and the act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property for any use other than a public one, or fails to make compensation, the act is simply void; no right of taking as against the owner is conferred, and he has the same rights and remedies against a party acting under such authority as if it had not existed. In general, therefore, where any act seems to confer an authority to take property, and the grant is not clear and explicit, and no compensation is provided by it for the owner or party whose rights are injuriously affected, the courts will presume that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those affected.<sup>1</sup>

An exclusive privilege to build a bridge is a franchise, not only as to the right to build and maintain it, but as to the exclusion of all other such grants, though the limits of such exclusion extend beyond the limits set for the location of the proposed bridge. And such an exclusive privilege is not held subject to any implied condition of yielding it up without compensation if required by the public convenience. Although it is competent for the legislature to grant to others a franchise which interferes with such exclusive right, if they provide in the new grant for compensation to be made, they cannot make such new grant without providing for compensation. It is not enough that the grantees of the former privilege may have an action for damages against the grantees of the latter.<sup>2</sup>

<sup>1</sup> *Boston & Lowell R. R. Co. v. Salem & Lowell, &c. R. R. Co.*, 2 Gray (Mass.), 1; *Matter of Flatbush Avenue*, 1 Barb. (N. Y.) 286; *Matter of Hamilton Avenue*, 14 id. 405.

<sup>2</sup> *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Fort Plain Bridge Co. v.*

*Smith*, 30 N. Y. 44; *Oswego Bridge Co. v. Fish*, 1 Barb. Ch. (N. Y.) 547; *Mohawk Bridge Co. v. Utica, &c. R. R. Co.*, 6 Paige (N. Y.), 554. In the case of the *Binghampton Bridge Co.*, 3 Wall. (U. S.) 51, it was held, reversing the same case in 27 N. Y. 87, that an enactment by a State in incorporating a company to build a toll-bridge and take tolls fixed by the act, that

There is no difference in this respect between lands taken by the corporation under the right of eminent domain, and those which were acquired by it by purchase. Both are entitled to equal protection in its hands, so long as necessary for its use.<sup>1</sup> The circumstance that the corporation has taken lands under this power, for what the legislature has adjudged to be a public use, does not strip them of their character as private property, in the hands of such corporation, so as to authorize the legislature to give to another corporation the right to take any part of them for its use without compensation.<sup>2</sup>

Whatever may be the nature of the title acquired by the corporation under the exercise of the right of eminent domain, whether it is to be regarded as investing it with an easement merely, or with the fee, *whatever interest it does acquire is its property*, and is *private property*, although acquired and held for

it should not be lawful for any person or persons to erect any bridge within two miles either above or below the bridge authorized, was within the case of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 625, and a contract inviolable although the charter of the company was without limit as to duration. The court here say: "We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was that an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. The security from property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken. A departure from it now would involve danger to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government. An attempt even to reaffirm it could only tend to lessen its force and obligation." This doctrine had been conceded in the same case in the Court of Appeals of New York, but it was there held that the contract was not to be implied because the franchise was not directly granted by the act in question, but only by reference to former enactments. Of

this the Supreme Court say that a contract may be made in this way as well as by direct enactment. The doctrine of the Binghampton Bridge Case had been laid down in Piscataqua Bridge v. N. H. Bridge, *ante*; Hartford Bridge Co. v. East Hartford, 16 Conn. 149; Bridge Co. v. Hoboken Land and Improvement Co., 13 N. J. Eq. 81; Townsend v. Blemott, 6 Miss. 503; Newburgh Turnpike Co. v. Miller, 5 Johns. Ch. (N. Y.) 100. A grant to a toll-bridge company, with a prohibition of any other bridge within a mile, is not infringed by a subsequent grant for a railroad bridge within that distance, to be used exclusively for railroad purposes. Lake v. Virginia, &c. R. R. Co., 7 Nev. 294; Bridge Co. v. Hoboken Land and Improvement Co., 13 N. J. Eq. 81; affirmed, 1 Wall. (U. S.) 116; *contra*, Enfield Toll-Bridge Co. v. Hartford and N. H. R. R. Co., *ante*. Nor is a ferry franchise infringed by a subsequent bridge franchise. Piatt v. Covington & Cincinnati Bridge Co., 8 Bush (Ky.), 31.

<sup>1</sup> Evergreen Cemetery Assoc. v. New Haven, *ante*.

<sup>2</sup> South Western R. R. Co. v. Southern Tel. Co., 46 Ga. 4; Grand Rapids, New-  
ago, & Lake Shore R. R. Co. v. Grand Rapids & Indiana R. R. Co., 35 Mich. 265; 24 Am. Rep. 545.

a public use, and, at least in the case of railroad corporations, it is evident that its use, in order that its rights as granted by its charter may be exercised, must not only be permanent, but exclusive. In the language of an able judge<sup>1</sup> in a well-considered case, in which this question was involved, and received at the hands of the court very careful attention, — “From the very nature of the construction and operation of railroads, the public cannot use their road in the usual or ordinary manner of using a common public highway. Neither the State nor any of its departments or municipalities, have or claim any interest in the property or franchises of the company. They neither pay nor contribute toward the purchase of the right of way, or to keeping it in proper repair afterward. All this is done by the company itself and through its efforts. [And the right thus acquired and paid for by the company is as much its property, and of value to it, as would be a like right or interest if owned by an individual. In justice, therefore, the corporation should have as clear a right to compensation for an injury sustained, in consequence of an appropriation or use of its property by another without its consent, as an individual would.] The theory that land taken under the power of eminent domain is taken for the public use has really caused much mischief. The term ‘public use’ or ‘public purpose’ is misleading. An object may be public for one purpose, while for others it would not be. Corporations have frequently, in order to accomplish their purposes, sought to give this term its broadest meaning, and then used it as a foundation, to erect structures thereon wholly at variance with all well-known legal principles. In this they have derived encouragement and support from the courts, in holding that property thus taken and held by a private corporation is taken for a public purpose, in order to find some ground upon which to authorize its being taken *in invitum*. Now, while railroads in one sense are for the use and accommodation of the public, and to this extent may be considered as used for public purposes, the mistake in this case consists in assuming that the property by them acquired, having been taken for a public purpose, may be used and appropriated by any other corporation for a similar public purpose, without making compensation therefor; that property public for one purpose shall be public for all.

<sup>1</sup> MARSTON, J., in *Grand Rapids, &c. R. R. Co. v. Grand Rapids & Indiana R. R. Co.*, *ante*.



But is this true? In the case of a common public highway, every one has an equal right of passage over it; but if it is sought to appropriate it to some essentially different public use, as a railroad, it is now generally conceded that the owner of the soil would be entitled to additional compensation. A turnpike is also a public highway, which the public have a right to use upon paying toll. If it is appropriated to some other public use, the turnpike company would be entitled to compensation, and if the new use was essentially different from the old, the owner of the reversion would also be entitled to compensation. In the one case the public have the right to the free use of the road, in the other, to the use upon paying toll; but in neither event are their rights considered in case of the road being appropriated to a different purpose. If lands are taken for a site for a light-house or a fort, although clearly taken for public purposes, yet the public, as such, are excluded therefrom. The use for which it is designed is one that is inconsistent with individual rights, either separately or collectively. In some cases where property is required for public use, a mere temporary use or easement only is required, while in others an apparently perpetual and exclusive occupation is required. In the former class, whenever the public easement is relinquished or vacated, the owner of the reversion is restored to his original rights, while in the latter class it would not follow that he would have any rights whatever upon a relinquishment of the uses for which the property was acquired. It is apparent, therefore, that it will not do to say that property taken for a particular public use thereby becomes public for all purposes. The public may have the right to use it for certain purposes, and yet individuals or private corporations have rights therein at the same time. These rights may be considered as private rights, separate and distinct from the rights of the public. *Wherever such private rights exist, they are entitled to protection, and can only be divested in the same manner and under the same laws that individual rights may be.*"

The legislature has no power to take the franchises of one company and give them to another, without compensation.<sup>1</sup> Thus, Congress has no power, by declaring railways to be post-roads, to authorize a telegraph company to establish its lines over the right of way of a railway company, without making compensa-

<sup>1</sup> Boston Water Power Co. v. Boston & Worcester R. R. Co., 23 Pick. (Mass.) 360.

tion according to law.<sup>1</sup> But it is now well settled that there is no implied contract by the State in a charter of a turnpike or other private corporation, that their property, or even their franchise itself, shall be exempt from the common liability of the property of individuals to be taken for the public use; that it may be taken, on proper compensation being made; that a railroad is an improved highway, and that property taken for its use, by authority of the legislature, is property taken for the public use, as much as if taken for any other highway; and that the legislature may delegate its power to a railroad corporation, to take private property for public use in the construction of their railroad, as well as to a turnpike corporation to take the like property for the public use in the construction of a turnpike road.<sup>2</sup> So it may authorize the laying out of a common public highway over a road made by a turnpike corporation, and the taking of the franchise of the corporation for that purpose, notwithstanding the charter of the corporation is still in force, and the corporation in possession of the road constructed by virtue of it, — provided compensation is made to the corporation for their property thus taken.<sup>3</sup> A stipulation that the property or franchises of a corporation shall not be taken for public use upon just compensation, if required by the public exigencies, cannot be implied or inferred from the grant of the right to

<sup>1</sup> *Atlantic & Pacific Tel. Co. v. Chicago, Rock Island, &c. R. R. Co.*, 6 Biss. (U. S. C. C.) 158. Land occupied as a public street cannot be taken without compensation, even by authority of the legislature. *Jersey City, &c. R. R. Co. v. Jersey City, &c. Horse R. R. Co.*, 20 N. J. Eq. 61; *Hoboken Land, &c. Co. v. Hoboken*, 36 N. J. L. 540.

<sup>2</sup> *White River Turnpike Co. v. Vermont Central R. R. Co.*, 21 Vt. 590.

<sup>3</sup> *Barber v. Andover*, 8 N. H. 398; *Armington v. Town of Barnet*, 15 Vt. 745. An exclusive right to maintain a toll bridge within certain limits is a franchise which may be appropriated for the public good upon just compensation being made therefor. *Tenn. Supreme Ct.* 1853, *Red River Bridge Co. v. Mayor, &c. of Clarksville*, 1 Sneed (Tenn.), 176. Under the general railroad law of New Hampshire of 1844 providing that any real es-

tate, franchise, or easement of any corporation may be taken for a highway, in the same manner as the real estate of individuals, the track or other property of one railroad company may be taken by another, if it appear that the public good requires such taking. *Northern R. R. v. Concord & Claremont R. R.*, 27 N. H. 183. Whether, if the charter of a corporation contains an express stipulation against its property being taken away by the right of eminent domain this would secure it, see *West River Bridge v. Dix*, 6 How. (U. S.) 507; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Washington Bridge v. State*, 18 Conn. 53; *Washington & Baltimore Turnpike Co. v. Baltimore & Ohio R. R. Co.*, 10 G. & J. (Md.) 392; *Harvey v. Thomas*, 10 Watts (Penn.), 63; *Harvey v. Lloyd*, 3 Penn. St. 331; *Shoenberger v. Mulhollan*, 8 Penn. St. 134.

organize as a corporation, or to acquire property for a particular use, and to take a compensation in tolls for the use of it. Nor can it be inferred from the fact that the property is, in its nature, an incorporeal hereditament,—as, a right of way. The fact that the corporation does not own the fee of the land over which their road is constructed, does not imply any such stipulation, nor the fact that a part of the property is a franchise. Incorporeal hereditaments, as well as a fee, may be taken, and this whether the property belongs to an individual or a corporation.<sup>1</sup> Even if the taking of the property may, incidentally, put an end to the exercise of the corporate powers because nothing is left for their exercise, this is no objection. There is no implied contract that the corporation may not be dissolved, or its operation be suspended by a subsequent exercise of the right of eminent domain, if their property, franchise included, is of such a nature that that power may operate upon it.<sup>2</sup> A provision in the charter of a corporation by which the State reserves the right to purchase the property after a certain period, does not imply in any manner a relinquishment of the right to take the property of the corporation, or any part of it, if required for public use, upon making just compensation.<sup>3</sup>

Where a corporation created by the legislature was authorized to erect a toll-bridge, and in the charter it was provided that “no person or persons shall have liberty to erect another bridge” within certain limits, it was held that this was not a contract, beyond the grant of a franchise, which precluded the State from authorizing another bridge to be made within the limits, *on compensating the first company for the injury to them*.<sup>4</sup> The circumstance that the legislature has no power to repeal the charter of a corporation does not exempt its franchise from condemnation for public use,<sup>5</sup> as the taking of its property is not a repeal of its charter, but an enforced purchase of its property for a public use.<sup>6</sup> If the property and the franchise are inseparable, they may both be taken.<sup>7</sup> Compensation being made, there is no impairment of the obligation

<sup>1</sup> Backus v. Lebanon, 11 N. H. 19; Co., 14 Ill. 314; Trustees v. Salmond, 11 Northern R. R. v. Concord, &c. R. R., 27 Me. 109.  
N. H. 183.

<sup>2</sup> Backus v. Lebanon, 11 N. H. 19.

<sup>3</sup> Id.

<sup>4</sup> Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 454.

<sup>5</sup> Jeffersonville R. R. Co. v. Dougherty, 40 Ind. 33; Illinois Canal v. Chicago R. R.

Co., 14 Ill. 314; Trustees v. Salmond, 11 Me. 109.  
<sup>6</sup> Grand Junction R. R. Co. v. Middlesex, 14 Gray (Mass.), 553; State v. Hudson Tunnel Co., 38 N. J. L. 548.

<sup>7</sup> Crosby v. Hanover, 36 N. H. 404; West River Bridge v. Dix, 6 How. (U. S.) 507; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420.

of a contract in taking such franchises and property,<sup>1</sup> and the provision for compensation recognizes the validity of the contract.<sup>2</sup> The entire franchise of a corporation need not be condemned where both can exist together. Thus, a railway company can run its trains upon its roadway, although another company is also authorized to run its trains upon the same track. The property in the railway still remains in the original owner, but the franchise is impaired by the privilege given to the other company, and must be compensated for.<sup>3</sup>

SEC. 230. **Exclusive Grants: Presumptions as to Earlier Grants.** — While a grant of privileges to a corporation may be exclusive, and the legislature may not have reserved to itself the right to alter, amend, or repeal its charter, or even though there may be an express stipulation in the charter that no other similar corporation shall be established within a certain distance of it, yet it is held that the grant shall be presumed to have been made upon the condition that no other similar corporation shall be established, *without proper compensation to it*, and that the establishment of another corporation within the distance named, *which provides for just compensation to such corporation for the injury to its franchise*, does not impair the obligation of any contract, but leaves the corporation subject, as it should be, to all the incidents of citizenship, and of the exercise of sovereign powers for the public good.<sup>4</sup> Grants of this character are con-

<sup>1</sup> Baltimore T. Co. v. Union R. R. Co., 35 Md. 224; Richmond R. R. Co. v. Louisa R. R. Co., 13 How. (U. S.) 71.

<sup>2</sup> West River Bridge v. Dix, 6 How. (U. S.) 507.

<sup>3</sup> Jersey City, &c. R. R. Co. v. Jersey City Horse R. R. Co., 20 N. J. Eq. 61; State v. Noyes, 47 Me. 189; Salem Turnpike Co. v. Lynn, 18 Conn. 451.

<sup>4</sup> Richmond, &c. R. R. Co. v. Louisa, &c. R. R. Co., 13 How. (U. S.) 71. In this case the legislature of Virginia incorporated the stockholders of the Richmond, Fredericksburg, & Potomac R. R. Co., and in the charter pledged itself not to allow any other railroad to be constructed between those places, or any portion of that distance; the probable effect would be to diminish the number of passengers travelling between the one city and the other upon the railroad authorized by that act,

or to compel the said company, in order to retain such passengers, to reduce the passage-money. Afterwards the legislature incorporated the Louisa Railroad Company, whose road came from the West and struck the first-named company's track nearly at right angles, at some distance from Richmond; and the legislature authorized the Louisa Railroad Company to cross the track of the other, and continue their road to Richmond. In this latter grant, the obligation of the contract with the first company is not impaired within the meaning of the Constitution of the United States. In the first charter, there was an implied reservation of the power to incorporate companies to transport other articles than passengers; and if the Louisa Railroad Company should infringe upon the rights of the Richmond Company, there would be a remedy at law, but the appre-

strued strictly, and no rights are acquired by implication which curtail or injuriously affect the public interests, but the franchise must stand upon the express terms of the statute conferring it. It may be questionable whether the franchises of one corporation can be taken for another, where they both serve the same public purpose, and accomplish the same ends and results. Thus, it would perhaps not be competent for the legislature to take the franchises of one railway for another, when they both have the same *termini* and route. SHAW, C. J., in a leading case<sup>1</sup> upon this head, said: "The plaintiffs still retain their franchise, they still retain all their rights derived from the legislative grants; and the only effect of the subsequent acts is to appropriate to another and distinct public use a portion of the land over which their franchise was to be used. We cannot perceive how it differs from the case of a turnpike or canal. Suppose a broad canal extends across a large part of the State. The proprietors have a franchise similar to that of the plaintiffs, to use the soil in which the bed of the canal is formed, and it is, in the

hension of it will not justify an injunction to prevent them from building their road. Nor is the obligation of the contract impaired by crossing the road. A franchise may be condemned in the same manner as individual property. *New Jersey Southern R. R. Co. v. Long Branch Comm'rs*, 25 N. Y. Eq. 28; *Metropolitan City R. R. Co. v. Chicago, &c. R. R. Co.*, 87 Ill. 317; *Boston & Lowell R. R. Co. v. Boston & Salem R. R. Co.*, 2 Gray (Mass.), 1; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *New Orleans, &c. R. R. Co. v. Southern, &c. Tel. Co.*, 53 Ala. 211; *West River Bridge v. Dix*, 6 How. (U. S.) 507; *Beekman v. Saratoga, &c. R. R. Co.*, 3 Paige Ch. (N. Y.) 45. In *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, GRAY, J., says: "In this country, as in England, every grant from the sovereign power is, in case of ambiguity, to be construed strictly against the grantee and in favor of the government. *The rights of the public are, therefore, not to be presumed to have been surrendered to a corporation, except so far as an intention to surrender them clearly appears in the charter.* The grant of a franchise from the commonwealth for one public object is not to be unnecessarily interpreted to the disparagement of an-

other. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 544-548; *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. (U. S.) 172, 192; *Richmond, Fredericksburg & Potomac R. R. Co. v. Louisa R. R. Co.*, 13 id. 71; *Cleveland v. Norton*, 6 Cush. (Mass.) 383, 384; *Boston v. Richardson*, 13 Allen (Mass.), 146, 156. It is upon this principle that it has been held that a general authority to lay out highways will not warrant the laying out of a highway over navigable waters; that a charter for the construction of a turnpike or railroad from one place to another will not authorize the grantees to obstruct an existing highway, unless such obstruction is necessary to give a reasonable effect to the statute; and a grant of land covered by tide water does not affect the power and duty of the legislature to protect the public rights of navigation and fishing over it." *Commonwealth v. Coombs*, 2 Mass. 489; *Wales v. Stetson*, id. 143; *Springfield v. Connecticut River R. R. Co.*, 4 Cush. (Mass.) 63; *Commonwealth v. Alger*, 7 Cush. (Mass.) 53.

<sup>1</sup> *Boston Water Power Co. v. Boston & Worcester, R. R. Co.*, 23 Pick. (Mass.) 366. See also *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507; *Beekman v. Saratoga, &c. R. R. Co.*, *ante*.

same manner, derived by a grant from the legislature. It is a franchise. But if afterwards it becomes necessary to lay a turnpike, or a public highway across it, would this be a disturbance or revocation of the franchise, and inconsistent with the power of the legislature in exercising the right of eminent domain for the public benefit? It might occasion some damage; but that would be a damage to property, and, pursuant to the Bill of Rights, must be compensated for by a fair equivalent. It may be said that the way might be carried high over the canal, and so not obstruct it. But suppose a railroad, a new erection, not contemplated when the canal was granted, and from the nature of which, it must be kept on a level, so as to subject the canal proprietors to considerable expense and trouble; whatever other objections might be made to it, it seems to us, that it could not be considered as a revocation, still less an annihilation of the franchise of the proprietors. If it is suggested that under this claim of power *the legislature might authorize a new turnpike, canal, or railroad on the same line with a former one to its whole extent, we think the proper answer is, that such a measure would be substantially and in fact, under whatever color or pretence, taking the franchise from one company and giving it to another, in derogation of the first grant, not warranted by the right of eminent domain and incompatible with the nature of legislative power.* In that case the object would be to provide for the public the same public easement which is already provided for, and secured to the public by the prior grant, and for which there could be no public exigency. Such a case therefore cannot be presumed.

“If the whole of a franchise should become necessary for the public use, I am not prepared to say that the right of eminent domain, in an extreme case, would not extend to and authorize the legislature to take it, on payment of a full equivalent. I am not aware that it stands upon a higher or more sacred ground than the right to personal or real property. Suppose, for instance, that a bridge had been early granted over navigable waters, say in this harbor, at the place where East Boston ferry now is, and the extension of our foreign commerce, and the exigencies of the United States in maintaining a navy for the defence of the country, should render it manifestly necessary to remove such a bridge; I cannot say that it would not be in the power of the legislature to do it, paying an equivalent. Or suppose, as it has sometimes been suggested, that these dams of the plaintiffs, by checking the tide waters flowing through the

channels below Charles River bridge, and through the harbor of Boston, should have so far altered the regimen of the stream, as gradually to fill up the main channel of the harbor and render it unfit for large ships; suppose it were demonstrated, to the entire satisfaction of all, that this was the cause, that the harbor would become unfit for a naval station, or for commerce, by means of which most extensive damage would ensue to the city, to the commonwealth, and to the eastern States (for I mean to put a strong case for illustration), would it not be competent for the legislature to require the dams to be removed, the basins again laid open to the flux and reflux of the tide? I am not prepared to say that it would not, on payment of an equivalent. But it is not necessary to the decision of this cause, to consider such a case, because, as before said, the act of the defendants does not, in any legal sense, annul or destroy the franchise of the plaintiffs."

Where the grant of a new franchise does not in express terms give to the corporation the right to take the franchise of a corporation already established, the presumption is that the new corporation was not expected to interfere in any substantial degree with the franchises of the elder one.<sup>1</sup> *If however the two grants cannot stand*

<sup>1</sup> *State v. Montclair R. R. Co.*, 21 N. J. Eq. 328; *In re New York & B. R. R. Co.*, 20 Hun (N. Y.), 201; *Parker v. Sunbury, &c. R. R. Co.*, 19 Penn. St. 211; *Hatch v. Cincinnati, &c. R. R. Co.*, 18 Ohio St. 92; *In re Boston & Albany R. R. Co.*, 53 N. Y. 574; *Comm'rs of Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446. In *Alexandria & Fredericksburg R. R. Co. v. Alexandria & Washington R. R. Co.*, 75 Va. 780; 40 Am. Rep. 743, it appears that the Alexandria & Washington Railroad Company was chartered in February, 1854, for the purpose of constructing and operating a railroad between the cities of Alexandria and Washington. It had under its charter acquired title in fee to such lands as were suitable and necessary for the purposes for which it was incorporated, in the mode prescribed by statute, and had laid out its road and constructed its road-bed on the lands it had so acquired, and had laid its track, and was running its train thereon, when the Alexandria & Fredericksburg Railroad Company, having been authorized by act of assembly, approved June 4, 1870, to extend its line of road

from the city of Alexandria to a point on the Potomac, opposite the city of Washington, caused the track of their road to be laid upon the road-bed aforesaid of the Alexandria & Washington Railroad Company, appropriating the west eighteen and one-half feet of the same to its use. This strip of land constituting a part of the Alexandria and Washington company's road-bed, was taken from said company by the Alexandria & Fredericksburg Railroad Company, and condemned for its use by the judgment of the County Court of Alexandria County. The Alexandria & Fredericksburg Railroad Company were duly empowered by the general law to take the lands of private parties for the use of their said road; the legislature, having decided that it will be for the public utility, authorizes the company to take such lands as are needed for the purpose. And the law invested the company with title thereto in fee simple, upon the payment of the compensation determined on, subject however to certain restrictions and limitations in both the general law and in the special act of the legislature under which it had

together, and upon an application of the grant to the subject matter, it is found that the latter will be defeated unless it is permitted to

any authority to construct its road. After giving the authority to construct the road, the act contains a restriction and limitation of its powers in the following words: "Provided, that in the extension of the said railway it shall in no way interfere with the chartered rights or franchises of any railroad extending between Alexandria and Washington; but this proviso shall not be construed as preventing said Alexandria and Fredericksburg Railroad from crossing any such railroad." The company took a strip of eighteen and one-half feet of the road-bed of the Alexandria & Washington Railroad Company, extending the whole length of the road, amounting to eight acres and twenty-five perches, which had been appropriated to it, and the title to which in fee was vested in it by the law under its charter, and which it held under its chartered rights and franchises. ANDERSON, J., said: "It is contended by the counsel for the appellant in their able argument that this was no interference with the rights and franchises of said company. That it was only the appropriation of land of said company, as of individuals, and not its franchises, and that rights in this clause and franchises mean the same thing. And in support of their claim they cite the language of President TUCKER in Tuckahoe Canal Co. v. Tuckahoe R. R. Co., 11 Leigh (Va.), 75, in which he held that a franchise was an incorporeal hereditament; consequently, they say, it cannot be land. That is true; but, as was said by Judge TUCKER: 'It is a franchise to be a corporation with power to sue and be sued, and to hold property as a corporate body.' The property taken by the Alexandria & Fredericksburg Railroad Company was held by the Alexandria & Washington Railroad Company as a corporate body; and according to Judge TUCKER in the said opinion, is held as a corporate body by virtue of its franchise. And can it be said that it was no interference with the company's franchise to take the land which it held under it? I cannot think so. It seems to me that it was a very direct and serious interference with its franchise. The language of the

restriction is very strong, — 'shall in no way interfere;' and that the language might not be misunderstood, the restriction is expressed with greater fulness and force, — 'shall in no way interfere with the chartered rights or franchises of any railroad,' etc. It is very clear, it seems to me, that to take the lands of the company upon which its railroad bed was constructed, for the length of the road, or a part of them which it held under its chartered rights and franchises, was such an interference as is expressly prohibited by said clause of the act; and this, I think, more plainly appears from the latter part of the clause, which makes a saving in favor of the Alexandria and Fredericksburg company, that the language shall not be construed to prevent that company from crossing such road. It implies that without this qualification the legislature apprehended that the proviso might even prevent its crossing such road. It must be remembered that there are powers exercised by a corporation to appropriate land for its corporate purposes. And Judge COOLEY says: 'There is no rule more familiar or better settled than this, that grants of corporate powers, being in derogation of common right, are to be strictly construed; and this is specially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the State itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property.' If the foregoing views are correct, and I think they are, the County Court of Alexandria has no delegated authority to exercise the right of eminent domain under the statute in such cases, and consequently had no jurisdiction to adjudicate the question whether the land should be taken from one company and given to another company; and upon this ground said judgment of the County Court was *coram non judice*, and consequently null and void. It vested no right in the Alexandria & Fredericksburg company, and can form no barrier or impediment to the consideration and decision of this case, just as if there had been no such judgment rendered. For



interfere with the franchises of another corporation, the presumption is raised that such interference was contemplated by the legislature.

the court having no jurisdiction of the subject matter, there is no judgment in the way, and the case turns upon the question whether the Alexandria and Fredericksburg company had any authority of law to interfere with the chartered rights and franchises of the Alexandria & Washington company by appropriating to itself its road-bed, either in whole or in part. We have seen that it had no such right, and upon this view of the case the decree of the Circuit Court, I think, was clearly right, and ought to be affirmed. But if contrary to my understanding of the statute, it does delegate to the County Courts in such cases authority to exercise the right of eminent domain, and invests them with jurisdiction in general to determine what lands shall be condemned for the railroad company, and what shall not be, and to invest the title in fee simple to such as they condemn, — a power and jurisdiction which, I think, the statute may be searched in vain to find conferred on the County Courts in railroad cases, — it still remains a question, was the County Court of Alexandria invested with jurisdiction in this case to take from the Alexandria & Washington company its road-bed, in whole or in part, which it held in fee under its charter, devoted to the public use, and give it to the Alexandria & Fredericksburg company for another public use? It is undoubtedly true, it was said in *Proprietors of Locks & Canals v. City of Lowell*, 7 Gray (Mass.), 226, that land or other property which has in conformity with the provisions of the Constitution been devoted to the public use, may afterward in like manner be again taken and appropriated to the public service, under a subsequent statute duly enacted, if such purpose is expressly, or by unavoidable implication authorized by its provisions. . . . But if such an appropriation is once made, the property cannot afterward be interfered with, or the right of holding and enjoying it in that definite manner be interrupted or disturbed, except under the provisions of some subsequent statute, expressly or by necessary implication, authorizing its subjection to public service in another and different manner.

In the *Housatonic R. R. Co. v. Lee & Hudson R. R. Co.*, 118 Mass. 391, the court held that a charter to build and maintain a railroad between certain points, without describing its course and direction. . . . does not, *prima facie*, give any power to lay out the road over land already devoted to and within the recorded location of another railroad. It is not to be presumed that the legislature intended to allow land thus devoted to one public use to be subjected to another, unless the authority is given in express words or by necessary implication, — citing *Springfield v. Connecticut River R. R. Co.*, 4 Cush. 72. 'A general authority to lay out a railroad does not authorize a location over land already devoted to another public use.' *Mills on Em. Dom.* § 46. Numerous other cases are cited by appellee's counsel in support of this doctrine, which I need only refer to. *Boston & L. R. R. Co. v. Railroad Co.*, 2 Gray (Mass.), 35-37; *Hickok v. Hine*, 23 Ohio St. 523; s. c. 13 Am. Rep. 255; *In re Buffalo*, 68 N. Y. 171; *Milwaukee, &c. R. R. Co. v. Faribault*, 23 Minn. 169; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 325; *San Francisco & A. W. Co. v. Water Co.*, 36 id. 639; *Barber v. Andover*, 8 N. H. 398; *West Boston Bridge v. County Comm'rs*, 10 Pick. (Mass.) 270; *In re Boston & A. R. Co.*, 53 N. Y. 574. The appropriation of private property for the use of a railroad by a railroad company is by authority of the act of the legislature, which authorized the construction of the road, which COOLEY says, *supra*, must be held for this purpose the law of the land. And the County Court, it seems to me, could have no jurisdiction, in the face of such legislative action, to divert it from such use, and appropriate it to another, unless authorized by a subsequent act of the legislature in express terms, or by necessary implication; and to this result the authorities before cited lead. The power being extraordinary and against common right must be construed strictly. The omission of the legislature to embody these restrictions in the statute, in the revision of 1849, as recommended by the revisers, I do not think can be construed as a legis-

Thus, in a Massachusetts case,<sup>1</sup> this question was considered, and it was held that while an act of the legislature which authorizes the construction of a railroad between certain *termini*, without describing its precise course and direction, does not *prima facie* confer power to lay out the road along and upon an existing highway; yet that it is competent for the legislature to grant such authority either by express words or *by necessary implication*, and that such implication may result either from the language of the act, or *from its being shown by an application of the act to the subject matter, that the railroad cannot by reasonable intendment be laid in any other manner.*<sup>2</sup>

lative construction of the law in conflict with what seems to be the whole current of judicial decision. But I deem it unnecessary to pursue this inquiry further. The special act of the legislature which authorized the Fredericksburg & Alexandria company to construct this road, exempted, as I have endeavored to show, the property of the Alexandria & Washington company which the Fredericksburg & Alexandria company, in laying out its road, appropriated to itself from condemnation by that company, it being an interference with the chartered rights and franchises of the other company. And by virtue of that exemption it could not be taken by the Alexandria & Fredericksburg company, and it was not within the jurisdiction of any court to condemn it, because by that exemption it was not subject to the right of eminent domain. Upon this aspect of the case I will content myself with a reference to the able opinion of the judge of the Circuit Court. Whilst I have confidence in the correctness of the ground first taken in this opinion, I am inclined to the opinion that upon this view also the County Court exceeded its jurisdiction in its judgment of condemnation, and that consequently its said judgment may be attacked collaterally."

<sup>1</sup> Springfield v. Connecticut River R. R. Co., 4 Cush. (Mass.) 63.

<sup>2</sup> Little Miami, C. & X. R. R. Co. v. Dayton, 23 Ohio St. 510; Morris & Essex R. R. Co. v. Newark, 10 N. J. Eq. 352; Chicago, Rock Island, &c. R. R. Co. v. Joliet, 79 Ill. 25; Rex v. Pease, 4 B. & Ad. 30; New York, &c. R. R. Co. v. Boston, &c. R. R. Co., 36 Conn. 136; Contra Costa R. R. Co. v. Moss, 23 Cal. 323; White River Turn-

pike Co. v. Vermont Central R. R. Co., 21 Vt. 590; Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co., 81 Ill. 523; Com. v. Old Colony, &c. R. R. Co., 14 Gray (Mass.), 93. The presumption is against the ability of one company to condemn the property and franchises of another corporation; and in order to sustain such action the words of the act must be clear and distinct. State v. Noyes, 47 Me. 189; Worcester R. R. Co. v. Railroad Commissioners, 118 Mass. 561; Milwaukee R. R. Co. v. Faribault, 23 Minn. 167; In re Ninth Ave., 45 N. Y. 729; Parker v. Sunbury & E. R. R. Co., 19 Penn. St. 211; Hatch v. Cincinnati & I. R. R. Co., 18 Ohio St. 92; In re New York Central & H. R. R. Co., 77 N. Y. 248; In re City of Buffalo, 68 N. Y. 167; Commissioners v. Holyoke Water Power Co., 104 Mass. 446; Chicago R. I. & P. R. R. Co. v. Joliet, 49 Ill. 25; Little Miami C. & X. R. R. Co. v. Dayton, 23 Ohio St. 510. If not conferred in express words, the authority must be by necessary implication. Thus, if the construction of the road between the termini as laid down in the charter would be impossible unless the road of another company is partly taken, the power to take such road would be implied. Central City Horse R. R. Co. v. Ft. Clark Horse R. R. Co., 81 Ill. 523; Springfield v. Conn. River R. R. Co., 4 Cush. (Mass.) 63; New York H. & N. R. R. Co. v. Boston, H. & E. R. R. Co., 36 Conn. 196; Bridgeport v. New York & N. H. R. R. Co., 36 Conn. 255; Worcester R. R. Co. v. Railroad Commissioners, 118 Mass. 561; Pennsylvania R. R. Co.'s Appeal, 3 Am. & Eng. R. R. Cas. 507. But where this circumstance does not exist, the power will not be im-

The right to tunnel a street may be implied from the circumstance that it is impossible to reach the designated *terminus* without doing so;<sup>1</sup> but the company is liable for injuries to adjacent buildings from such operation, regardless of the question of negligence.<sup>2</sup>

In the construction of railways, it necessarily occurs that highways and other railways must be crossed, and although the power is not expressly given, it is necessarily inferred. But authority to take the bed either of a highway or railway longitudinally for any considerable distance will not be inferred, especially where it is possible to build the road without doing so.<sup>3</sup> A town or other mu-

plied. *In re Boston & A. R. R. Co.*, 53 N. Y. 575; *St. Louis, J. & C. R. R. Co. v. Trustees*, 43 Ill. 303; *Danbury & N. R. R. Co. v. Norwalk*, 37 Conn. 109; *Atlanta v. Central R. R. Co.*, 53 Ga. 120; *Hannibal v. Hannibal & St. J. R. R. Co.*, 49 Mo. 480; *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345; *Boston & M. R. R. Co. v. Lowell & L. R. R. Co.*, 124 Mass. 368. The right of one railroad to cross another may be implied when a longitudinal taking cannot be justified. There is often a necessity for one when there is no necessity for the other, and the instances are rare in which a longitudinal taking can be justified. *In re City of Buffalo*, 68 N. Y. 167; *Housatonic R. R. Co. v. Lee & H. R. R. Co.*, 118 Mass. 391; *Worcester & N. R. R. Co. v. Railroad Comm'rs*, 118 Mass. 361; *Boston & M. R. R. Co. v. Lowell & L. R. R. Co.*, 124 Mass. 368; *Commonwealth v. Erie & N. E. R. R. Co.*, 27 Penn. 30, 339; *Cleveland & P. R. R. Co. v. Speer*, 56 Penn. St. 325; *Cake v. Philadelphia & Erie R. R. Co.*, 87 Penn. St. 307; *Tennessee & A. R. R. Co. v. Adams*, 3 Head, 596; *Oregon Cascade R. R. Co. v. Bailey*, 3 Or. 164; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323; *Starr v. Camden & Amboy R. R. Co.*, 9 N. J. L. 592; *Hoboken Land Co. v. Hoboken*, 35 N. J. L. 205; *National R. R. Co. v. Easton & A. R. R. Co.*, 36 N. J. L. 181; *Attorney-General v. Morris & Essex R. R. Co.*, 19 N. J. Eq. 386; *Newark & N. Y. R. R. Co. v. Newark*, 24 N. J. Eq. 515; *Greenwich v. Easton & A. R. R. Co.*, 23 N. J. Eq. 217; 25 id. 565; *Green v. Wycombe Ry. Co.*, L. R. 9 Q. B. 210; *Pugh v. Golden Valley R. R. Co.*, L. R. 12 Ch. Div. 274; *Attorney-General v. Ely, H. & S. R. R. Co.*, L. R. 4 Ch. 194.

The general rule is that when one railroad company crosses the tracks of another, just compensation must be made, and this includes compensation for the obstruction by reason of the crossing, and the consequent increased difficulty and danger in operating the line. *Lake Shore & Mich. S. R. R. Co. v. Chicago & W. Ind. R. R. Co.*, 100 Ill. 21; *Lake Shore & Mich. S. R. R. Co. v. Chicago, &c. R. R. Co.*, 2 Am. & Eng. R. R. Cas. 454; *St. Louis, &c. R. R. Co. v. Springfield, &c. R. R. Co.*, id. 487.

<sup>1</sup> *Baltimore & P. R. R. Co. v. Reaney*, 42 Md. 117.

<sup>2</sup> Id.

<sup>3</sup> *New Jersey Southern R. R. Co. v. Long Branch Comm'rs*, 25 N. J. Eq. 28; *Pugh v. Golden Valley Ry. Co.*, L. R. 12 Ch. Div. 274; *Regina v. Wycombe Ry. Co.*, L. R. 2 Q. B. 310; *Attorney-General v. Ely, &c. Ry. Co.*, L. R. 6 Eq. 106; *Attorney-General v. Morris & Essex R. R. Co.*, 19 N. J. Eq. 386; *Housatonic R. R. Co. v. Lee, &c. R. R. Co.*, 118 Mass. 391; *Worcester & Norwich R. R. Co. v. Railroad Comm'rs*, 118 id. 561; *Boston & Maine R. R. Co. v. Lowell, &c. R. R. Co.*, 124 id. 368; *National R. R. Co. v. Eastern, &c. R. R. Co.*, 23 N. J. Eq. 181; *St. Louis, &c. R. R. Co. v. Trustees*, 43 Ill. 303; *Hoboken Land Co. v. Hoboken*, 21 N. J. Eq. 205; *Starr v. Camden & Amboy R. R. Co.*, 24 N. J. L. 592; *Com. v. Erie, &c. R. R. Co.*, 27 Penn. St. 339; *Greenwich v. Eastern, &c. R. R. Co.*, 24 N. J. Eq. 217; *Long Branch Comm'rs v. West End R. R. Co.*, 29 N. J. Eq. 566; *Cake v. Philadelphia, &c. R. R. Co.*, 87 Penn. St. 307; *Oregon Cascade R. R. Co. v. Bailey*, 3 Oregon, 164; *Tennessee, &c. R. R. Co. v. Adams*, 3 Head (Tenn.), 596.

municipal corporation may lay out roads and streets across a railroad, but without express authority they cannot take the location of a railroad for either streets or highways.<sup>1</sup> Where two charters are

Says SCOTT, C. J., in *Chicago & Alton R. R. v. Joliet, Lockport, &c. R. R. Co.*, 105 Ill. 388: "Unless every railroad corporation takes its right of way subject to the right of the public to have other roads both common highways and railways constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the State would be an obstacle in the way of its future prosperity of no inconsiderable magnitude. The claim made for damages in this respect has neither reason nor the weight of authority for its support. In *Railroad Co. v. Railway*, 30 Ohio St. 604, it is well said, 'while the elder road can demand compensation for its property to the extent of its appropriation, it has no right to demand tribute from the junior road for the enjoyment of the same corporate franchises which it possesses.'" *Massachusetts Central R. R. Co. v. Boston, Clinton, &c. R. R. Co.*, 121 Mass. 125.

<sup>1</sup> *In re City of Buffalo*, 68 N. Y. 167; *Atlanta v. Central R. R. Co.*, 53 Ga. 120; *Northern Central R. R. Co. v. Baltimore*, 46 Md. 425; *Danbury, &c. R. R. Co. v. Norwalk*, 37 Conn. 109. In *City of Bridgeport v. New York & New Haven R. R. Co.*, 36 Conn. 255, BUTLER, J., said: "It appears from the finding that in laying out the highway in question, a portion of the land taken and appropriated by the railroad company for its use under its charter, was taken and appropriated as part of the highway through its whole extent. It does not appear that it was necessary to take it, and the necessity cannot be presumed. As matter of fact, outside the record, we all know that it was not. Whether or not it was so taken with a view to lay a foundation for assessing the contemplated benefits upon the remaining land, or the remaining interest of the company in the land, I do not know, nor is it material to inquire. I am satisfied that such an assessment could not be made upon either, and that if such was the original intention it was wisely

abandoned. In the first place, it is questionable whether the city of Bridgeport had power thus to take the land appropriated and occupied by the railroad, for such a purpose. The city of Bridgeport is authorized by its charter to lay out necessary public highways. In doing this its officers act under authority delegated by the legislature in general terms, and in the exercise of that power the officers of the city perform the same public duty and have substantially the same authority within their territorial limits by the provisions of their charter that the officers of boroughs and towns have and exercise in like cases and no more, and that is, an authority to lay out such streets and highways as public convenience and necessity may require. In doing that they may take and appropriate any property which has not been before subjected to the eminent domain of the State. But is the ribbon of land which the legislature in the exercise of that right of eminent domain have authorized this railroad company to take, appropriate and hold for the construction of a railroad, subject to be taken from them in whole or in part, and in the whole if in part, under a power to lay out highways previously given in general terms, by the authorities of every town, city or borough between New Haven and the western line of the State, and appropriated for the purposes of a highway? This question has not, to my knowledge, been judicially determined, but it would seem upon principle that it must be answered in the negative. The officers of towns in laying out highways act under a general authority, and those of the plaintiff city had a special but not more extensive power. The railroad company act under and possess a special and exclusive grant and that grant is a contract. The legislature has virtually said to them: 'We give you the privilege of exercising the public right of eminent domain over that ribbon of land, to the extent necessary to acquire, possess and enjoy an easement, and such exclusive control as may be neces-

granted for the construction of railways between the same *termini*, there being no necessary conflict in their objects or charters, the

*sary to its enjoyment*, in consideration that you will erect, maintain, and operate a railroad upon it.' Did they intend that that easement should be subject to be taken away from the company, in whole or in part, by the local authorities for the purpose of highways? The question in this aspect is one of presumed intent, and I think from the very nature of the case the legislature cannot be presumed to have intended to make, or the company to receive, such a limited and subordinate agent. Undoubtedly, the legislature may repeal the charter of the defendants and destroy their right in the land, for they have reserved the power to do it. And so they may authorize another company to appropriate its property and its franchise, upon making just compensation therefor, and may authorize a city to assess its franchise for benefits. But the intention to do so must be clearly and unequivocally expressed. No power is given to the city of Bridgeport in express terms to take the interest of the defendants in the land. Whatever power its officers have, is given, as I have said, in general terms; and it has been well said that a general power, thus given, ought not to be construed to authorize the taking of land already appropriated to a highly important public use. *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. (Mass.) 397, 398. In relation to the laying of highways *across* the land taken for railroads, such an intention may well be presumed, for in respect to them, in our growing country, a necessity must be anticipated, and therefore must be presumed to have been contemplated. But with respect to parallel highways no such necessity can exist, for the power given to appropriate the adjoining land of individual proprietors, *however occupied*, and *to any necessary extent*, is ample, and therefore as to parallel highways no such intent can be presumed. Moreover, the power to take and appropriate even parallel highways is given to this and other railroads by charter, and in the general law. If so taken, can the officers of this and other cities dispossess them again

whenever they think public convenience or necessity require it? And if they do, cannot the railroad company re-take it? Which is then to be the dominant corporation and ultimately prevail in the struggle? The solution of this question in my mind is, that when the railroad company have appropriated land under their grant with the approbation of the commissioners their right was intended to be and is exclusive, except as to crossings, which are an absolute necessity. 'The grant of land for one public use,' says Chief Justice SHAW, 'must yield to another *more urgent*,' 4 Cush. (Mass.) 63, and the railroad is treated by the legislature as the more urgent and exclusive use, and such it is in effect." *Hannibal v. Hannibal & St. Joseph R. R. Co.*, 49 Mo. 480. In *Milwaukee & St. Paul R. R. Co. v. Faribault*, 23 Minn. 167, it was held that under a general power to lay out and open streets, a city has no authority to open streets through depot grounds of a railroad company acquired under authority of the legislature, in such manner as to destroy or essentially impair the value of the company's easement therein. The court said: "The rule is well settled that in cases of this kind the legislative intent must be made to appear by express words or by necessary implication. Inhabitants of Springfield *v. Connecticut River R. R. Co.*, 4 Cush. (Mass.) 63; *City of Bridgeport v. New York & New Haven R. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574. And such implication never arises except as a necessary condition to the beneficial enjoyment and efficient exercise of the power expressly granted, and then only to the extent of the necessity. *Hickok v. Hine*, 23 Ohio St. 523: 13 Am. Rep. 256. . . . It is claimed by defendant that the city council, in this case, was the sole and exclusive judge as to the public necessity and propriety of laying out the proposed street, on the ground that the necessity and expediency of laying out highways is exclusively a legislative, and not a judicial, question. This is undoubtedly a correct rule as applied to the

prior right is with the one which is first with its location and survey.<sup>1</sup>

legislature itself, and also to a municipal body when acting within the conceded limits of its delegated powers. But when, as in this case, the jurisdiction of the inferior tribunal over the particular subject-matter depends, not upon an express grant of power, but upon the existence of an alleged necessity from which the disputed power is to be implied, the decision of such tribunal upon the existence of the necessity is neither final nor conclusive upon the courts." So, in *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574, it was held that in the absence of express authority or necessary implication, a railroad company could not take lands held by a municipal corporation in trust, for the use of the public as a park or common. In *Matter of City of Buffalo*, 68 N. Y. 167, it was held, under similar circumstances, that a city empowered to take land for canals, basins, slips, etc., could not take lands of a railroad company, used for its yard, depot, etc. The court, by FOLGER, J., said: "In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together with some tolerable interference which may be compensated for by damages paid, — if the latter use when exercised, must supersede the former, — it is not to be implied from a general power, given without having in view a then existing and particular need therefor, that the legislature meant to subject the lands devoted to a public use already in exercise to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally ap-

pear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter of it, so that by reasonable intendment some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner." In *Central City R. R. Co. v. Fort Clark R. R. Co.*, 81 Ill. 523, it was held that a horse railway company cannot take part of a railway of another like company. The court said: "We do not wish to be understood as holding one railroad company may not condemn the road of another, under a power granted by the legislature so to do. On this we express no opinion; but we do insist, an established railroad being a public institution, and useful only in its entirety, cannot be cut up and sectionized by a competing road, acting under an ordinance of a city council. Proceedings might be instituted perhaps to condemn the entire road and franchise, and thus pass it over as an entirety to the competing road; but that one competing road can bisect it here, and another there, at a different point, taking to themselves the most productive portions of the road, and leaving an unproductive fragment to the first proprietors, we do not believe, and have seen no authority giving countenance to a doctrine, in its operation so unjust and at war with just principles. And we are at a loss to understand how this part of appellants' franchise, occupying the most populous and business part of the city, can be operated jointly by their competitors. But whether it can or not be safely done, it is unimportant to inquire, as in our opinion, one competing street railroad company cannot take, by the exercise of the right of eminent domain, a fragment of a competing road in successful operation, and the most valuable part of it, and thus destroy, in effect and usefulness and value, the remaining fragments."

<sup>1</sup> *Morris & Essex R. R. Co. v. Blair*, 9 N. J. Eq. 635; *Waterbury v. Dry Dock, &c. R. R. Co.*, 54 Barb. (N. Y.) 388.

SEC. 231. **What constitutes a "Taking."** — The constitutional provision declaring that "private property shall not be taken for public uses without just compensation" does not prohibit the legislature from authorizing a temporary exclusive occupation of the land of an individual, during incipient proceedings to the acquisition of a title to it or an easement in it for a public use, although such occupation may be more or less injurious to the owner; *but precludes the acquisition of any title, easement, or permanent appropriation of the land from the owner, without an actual payment or tender of a just compensation.* Such occupation becomes unlawful, unless the title or the easement is acquired within a reasonable time; otherwise the occupiers become trespassers *ab initio*.<sup>1</sup>

It is not necessary that property should be "taken" in a literal sense in order to entitle the owner to compensation. *A serious interruption to the common and necessary use of property* may amount to a taking and entitle the owner to compensation, although the land itself is not taken from him; as, where water is set back, or earth and sand is cast thereon, or a structure is erected thereon, under a statute authorizing such acts for the public benefit.<sup>2</sup> Thus, a railway company, claiming to act under legislative authority, removed a natural barrier situated north of E.'s land, which had always before completely protected his meadow from the effects of floods and freshets in a neighboring river. In consequence of this removal, the waters of the river, in times of floods and freshets, sometimes flowed on to E.'s land, carrying sand, gravel, and stone thereon. It was held that this was a taking of E.'s property, within the meaning of the constitutional prohibition; and that the legislature could not authorize the infliction of such an injury without making provision for compensation. The principle must be the same, whether the owner is wholly deprived of the use of his land or only partially deprived of it; although the amount or value of the property taken in the two instances may widely differ. A partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part is as much forbidden by the Constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same. In asserting a right to maintain such

<sup>1</sup> Cushman v. Smith, 34 Me. 247;      <sup>2</sup> Pumpelly v. Green Bay Co., 13 Wall. Nichols v. Somerset & Kennebec R. R. (U. S.) 166.  
Co., 43 Me. 356.

a cut, a railroad company necessarily asserts the right to produce all the results which naturally follow from the existence of the cut. In effect it thus asserts a right to discharge water on the land. Such a right is an easement. A right of occasional flooding is just as much an easement as a right of permanent submerging; it belongs to the class of easements which are by their nature intermittent, — that is, usable or used only at times. An easement is property, and is within the protection of the constitutional prohibition.<sup>1</sup> The flooding of land owned by private individuals, by the placing of artificial obstructions in the bed of a river, is a taking of the land, within the meaning of the provision of the Wisconsin constitution requiring compensation to be made for private property taken for public use. Consequently, an act authorizing the construction of a dam in a running stream, which would cause such flooding of private land, and not providing for compensation to the owners is unconstitutional and void.<sup>2</sup> A statute which authorizes an entry upon land, for the purpose of making the preliminary or final surveys for a corporate work, before compensation is made, is constitutional, if it makes suitable provision for compensation in case the land is subsequently taken therefor. Unless the legislature possess power to authorize an entry for this purpose, a clause of the Constitution permitting private property to be taken for public use, upon making just compensation, would be nugatory. A constitutional provision that private property shall not be taken for public use, etc., does not prohibit the legislature from permitting an entry to be made upon the property of an individual, for the purpose of a preliminary examination. The prohibition relates only to the *taking it* for public use without just compensation.<sup>3</sup>

The use by a company of land adjoining their railroad, for a cart-way while constructing their road, is not within the limits of the commissioner's appraisal, especially when it appears that the land taken for the road is sufficiently ample in width for cartways. Such use is *prima facie* for the purposes of convenience, not of necessity, and without the consent of the owner of the land is ordinarily a mere trespass. The only use of adjoining lands, for passage during the construction of a railroad, that can come within the limits of the appraisal, extends to gaining access to the land taken.<sup>4</sup>

<sup>1</sup> *Eaton v. B. C. & M. R. R.*, 51 N. H. 504.

<sup>2</sup> *Arimond v. Green Bay, &c. Canal Co.*, 31 Wis. 316.

<sup>3</sup> *Polly v. Saratoga & Washington R. R. Co.*, 9 Barb. (N. Y.) 449.

<sup>4</sup> *Sabin v. Vermont Central R. R. Co.*, 25 Vt. 363.



In an English case a corporation, having, under the act of Parliament, right to take land for certain public works, gave notice to the owner of the inheritance, of an intention to take it. They then entered regularly upon the land for the purpose of surveys, etc., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some wagons, and rails, and other implements on the land, and there left them, but did not commence the works, or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the wagons, etc., to remain on the land, and from taking possession of the land until they had complied with the provisions of the lands clauses consolidation act. It was held that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the act, and that the bill was improperly filed.<sup>1</sup>

If a person's land is taken, he is then entitled to have his damages assessed for probable consequential injuries; but except under peculiar statutes, a person whose land is not taken has no remedy, either by having his damages assessed under the statute or by an action therefor. Thus, if a railway is laid along the border of a person's land, but no portion of his land is taken, while he is burdened with the duty of fencing occasioned by such act, yet his damages are purely consequential;<sup>2</sup> and the same is also true of the construction of a railway so near the buildings of another that the vibration and jarring from the motion of its trains injures its walls, and the smoke and cinders from the engines are cast thereon from a proper operation of the road; the rule is, *damnum absque injuria*.<sup>3</sup>

The making of a public improvement in the vicinity of private property, which is incidentally injured thereby, but no part of which is taken or used for the construction of the work, is not a taking of private property for public use, within the constitutional provision

<sup>1</sup> *Standish v. Mayor, &c. of Liverpool*, 1 Drew. 1.

<sup>2</sup> *Kennett's Petition*, 24 N. H. 139.

<sup>3</sup> *Cogswell v. N. Y. & N. H. R. R. Co.*, 48 N. Y. Superior Court, 31. But see *Baltimore & Potomac R. R. Co. v. Reaney*, 42 Md. 117, where it was held that a railway company was liable for in-

juries resulting to adjacent buildings from tunnelling under a street, which were the natural and inevitable result of such operation, whether guilty of negligence in prosecuting the work or not; and that, there being no other remedy provided by statute, an action for the damages would lie.

requiring the payment of compensation.<sup>1</sup> Thus a corporation, in constructing their works, raised a high embankment near to, and in front of, the plaintiff's house, so that the plaintiff could not pass and repass to and from the same, and for this injury the plaintiff claimed damages. It was held that as the charter of the company only required them to make compensation for lands which were taken for the corporate purposes, they were not liable for such consequential damages; that simply affecting land injuriously, by the construction of their works, was not a taking of it for public use, within the purview of the Constitution; that the company were justified, under their charter, in building their road in a prudent and reasonable manner, and could not be subjected to damages resulting to individuals whose lands had not been taken by them.<sup>2</sup> But where a railroad company, having power by charter to take land, and being made liable for all damages to any person or persons, excavated a lot adjoining the plaintiff's, so as to weaken the foundations of his house, and erected an embankment in the highway opposite his house, so as to obscure the light, and render it otherwise unfit for use, — it was held that although this did not constitute a taking of the plaintiff's land within the meaning of the charter, yet the company were bound to make compensation for consequential damages.<sup>3</sup>

It is not a good objection to a proceeding to ascertain the value of land taken for public use by authority of law, that it had been previously taken possession of without authority.<sup>4</sup> Nor will a company be deprived of the power to take land for the necessary use of their works, when the emergency arises, by having previously

<sup>1</sup> *Alexander v. City of Milwaukee*, 16 Wis. 247.

<sup>2</sup> *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465.

<sup>3</sup> *Bradley v. New York & New Haven R. R. Co.*, 21 Conn. 294. Injury to a mill-privilege upon a navigable stream, by a rise in the waters caused by improvements in the navigation, was held not a taking of private property which is a subject of compensation. *Canal Appraisers v. Tibbits*, 17 Wend. (N. Y.) 571. Though a franchise, that is, the right to maintain a toll-bridge, is private property, a diminution of its productiveness, by means of the opening of a free highway in the neighborhood, is not a taking of it within the provision of the Constitution. *Matter of Hamilton Avenue*, 14

*Barb. (N. Y.)* 405. Compare *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.), 176. Where a corporation located a plank-road upon a county road, it was held that the corporation was liable for damages caused by making such road, that is, by endangering the stability of houses along the line of the road by excavations. The grant of the right of locating a plank-road upon a county road does not exclude the idea that the owner of the soil over which the road passes should have compensation for any injury he may sustain by changing a county road into a plank-road. *Williams v. Natural Bridge Plank-Road Co.*, 21 Mo. 580.

<sup>4</sup> *Borough of Harrisburg v. Crangle*, 3 W. & S. (Penn.) 460.

attempted to take it for other purposes, not warranted by their act.<sup>1</sup> But the power of taking land by a company is exhausted by a location; the company cannot be indulged with another choice.<sup>2</sup> But where a railway company has power to take a certain quantity of land, that power is not exhausted by their taking in the first instance a smaller quantity, if they subsequently find that the quantity comprised in their first purchase is not sufficient for their works. Thus, a railway company, having given notice of their intention to build a railway under an individual's land by means of a tunnel, and to treat with him for the amount of compensation, are not thereby precluded from afterward giving notice of their intention to take, or from appropriating the surface of the same land, where they find that the making of the tunnel is impracticable or dangerous to the buildings on the surface.<sup>3</sup>

Where the legislature confers the power upon *two* railway companies to purchase compulsorily the same piece of land, and one company has taken the land and constructed its road upon it, equity will enjoin the other company from proceeding to take it compulsorily for its use, until the conflicting rights of the companies are determined by a trial at law.<sup>4</sup>

SEC. 232. **Conditions precedent.** — Where the statute imposes any conditions upon a railway corporation, precedent to their right to condemn lands for the use of their railway, they must be fully and specifically performed, to give validity to their proceedings. Thus, if the charter or general law requires that they shall first apply to the owners, and endeavor to agree upon the amount of compensation, unless it is shown that the owner is absent or legally incapacitated, they cannot proceed to take the necessary proceedings for condemnation, until they have made a *bond fide* effort to comply with the statute.<sup>5</sup> And the petition should set forth that a *bond*

<sup>1</sup> Webb v. Manchester & Leeds Ry. Co., 1 Eng. Ry. Cas. 576; Simpson v. Lancaster & Carlisle Ry. Co., 4 Eng. Ry. Cas. 625; Williams v. South Wales Ry. Co., 3 De G. & S. 354.

<sup>2</sup> Neal v. Pittsburgh, &c. R. R. Co., 2 Grant's Cas. (Penn.) 137.

<sup>3</sup> Stamps v. Birmingham, &c. Ry. Co., 7 Hare, 251.

<sup>4</sup> Manchester, &c. Ry. Co. v. Great Northern Ry. Co., 9 Hare, 284; Lancaster & Carlisle Ry. Co. v. Maryport & Carlisle Ry. Co., Eng. Ry. Cas., 504.

<sup>5</sup> Reitenbaugh v. Chester Valley R. R. Co., 21 Penn. St. 100. Before condemnation of private land for the use of the United States can be had under the act of 1859, the government must have sought to buy at a stated price, and it is only a disagreement upon the price which can authorize proceedings for condemnation under this act. Gilmer v. Lime Point, 19 Cal. 47. In Stacey v. Vt. Central R. R. Co., 27 Vt. 39, ISHAM, J., said: "It appears from the case also, that in February, 1850, the defendants changed their

*fide* effort has been made to agree with the owner, or a sufficient excuse therefor.<sup>1</sup> It would be impossible to define specifically what

line of road by locating the same on other land than that of the plaintiff, and upon which their road has been constructed. That alteration of their line of the road has superseded the necessity of taking the plaintiff's land on which the road was first surveyed. The right of the corporation to change the line of their road is given them by the 15th section of their charter, which provides that if the directors of that company, for any cause, shall deem it expedient, they may change the location of such parts of their road as they shall deem proper. That change in the line of their road, however, will operate as an abandonment of their former survey on the plaintiff's land, so that the company can no longer claim any right or interest in the land itself, or to any easement growing out of it, in consequence of that survey having been made. That doctrine has been expressly held in Massachusetts, in relation to highways, *Commonwealth v. Westborough*, 3 Mass. 406, and *Same v. Cambridge*, 7 Mass. 163, and the same effect, we think, will follow in cases of this character. The result is, that the plaintiff retains his land free from any incumbrance arising from that location or survey of the road. That abandonment of the line of the road over the plaintiff's land, however, does not necessarily supersede his claim for damages. The right to recover those damages, whether liquidated by the agreement of the parties or by commissioners, is not necessarily defeated by that act of the company. If the land has once been taken, if the company, for any period of time, have been seised and possessed of the land so appraised, or if the plaintiff has had, at any time, a perfected right to the damages awarded by the commissioners, a subsequent abandonment of that location, and the establishment of a new line for the road, will have no effect to defeat the plaintiff's claim for the damages which have been awarded to him.

*Westbrook v. North*, 2 Me. 179; *Hamp-ton v. Coffin*, 4 N. H. 517; *Harrington v. Comm'rs of Berkshire*, 22 Pick. (Mass.) 267; *Hawkins v. Rochester*, 1 Wend. (N. Y.) 53. Under such circumstances the plaintiff would be entitled, on the abandonment of that location, to the land free from any encumbrance of that character, and also to the damages which were allowed to him. The important question in the case therefore arises, whether the Vermont Central Railroad Company have ever been seised or possessed of this land of the plaintiff's, and for which the award of the commissioners was made; or has the plaintiff ever had a vested right to the damages which were awarded on that survey of the road. The determination of these questions depends upon the construction which is to be given to the 7th section of the charter of this company. We obviously can derive but little aid on this subject from adjudged cases in other States, unless they have arisen upon some statutory provision, embracing substantially the specific provisions of that section of this charter. By that section it is provided that when land or other real estate is taken by the corporation for the use of their road, and the parties are unable to agree upon the price of the land, the same shall be ascertained and determined by commissioners, together with the charges and costs accruing thereon, *and upon the payment of the same, or by depositing the amount in a bank as shall be ordered by the commissioners, the company shall be deemed to be seised and possessed of all such lands as shall have been appraised.* This provision is quite specific in stating what act on the part of the corporation vests in them a right to the land. They derive no title to the land or any easement growing out of it from the fact of their having surveyed the road across the plaintiff's land, or having placed that survey on record, nor by having the damages ap-

<sup>1</sup> *Reitenbaugh v. Chester Valley R. R. Co.*, *ante*. If, however, the petition in the first instance fails to set forth these

facts, it may be amended. *Pennsylvania R. R. Co. v. Porter*, 29 Penn. St. 165.

a railway company must do in order to entitle it to condemn lands for its use, because in every case it depends upon the provisions of

praised by commissioners, and causing their award to be recorded. The statute is express, that the payment or deposit of the money according to the award must be made before any such right accrues. Until that payment is made, the company have no right to enter upon the land to construct the road or exercise any act of ownership over the same. A court of equity would enjoin them from exercising any such right, or they might be prosecuted in trespass at law. The survey and appraisal of damages are merely preliminary steps to ascertain the terms upon which the land can be taken for such purposes, if the company shall see fit to use the same for the construction of their road. If it is accepted, and the company conclude to take the land, that acceptance and that taking is consummated only by a payment or deposit of the money, for the use of the owner of the land, as awarded and directed by the commissioners. The case of the Baltimore & Susquehanna R. R. Co. v. Nesbit *et al.*, 10 How. (U. S.) 395, is very decisive on this question. In that case land was taken by the company under a charter granted by the State of Maryland. Under a provision in their charter, the damages were assessed by a jury, and that assessment was confirmed by the court. In that case, as in this, the road was located, and the damages conclusively determined and settled, so that no further litigation could arise on that matter. In that case as in this also, the charter provided that the payment, or tender of payment of such valuation should entitle the company to the estate or land as fully as if it had been conveyed. The charter of that company and of this, in all particulars important upon this question, are substantially similar. The court remarked, 'that it is the payment or tender of the value assessed by the inquisition which gives the title to the company, and consequently without such payment or tender no title could, by the very terms of the law, have passed to them.' They further observed, 'that it can hardly be questioned, that without acceptance *in the mode prescribed*, the company were not bound; that if they had

been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty, before such acceptance, wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company into its adoption.' The same doctrine was sustained in the case of *Bloodgood v. Mohawk & Hud. R. R. Co.*, 18 Wend. (N. Y.) 10, 19. In that case the company were authorized to enter upon the land and make such examinations and surveys as were necessary to determine the most advantageous route for the road, and to take the same for that purpose; provided, that all land so taken shall be purchased by the company of the owner, and in case of a disagreement as to the price or value of the land, commissioners were to be appointed to determine the same, *and upon payment of such damages with the costs, or depositing the same in a bank in the city of Albany, then the corporation shall be deemed to be seized and possessed of the land so appraised.* It will at once be perceived, that the provisions of that charter are not only similar in this respect to that of the Vermont Central Railroad Company, but that they are expressed in very similar language. The Chancellor remarked 'that this provision should be considered in the nature of a condition precedent, not only to the acquisition of the legal title to the land, but also to the right to enter and take the permanent possession of the land for the use of the corporation.' It is very clear, from these cases, that as the Vermont Central Railroad Company have never paid or deposited the amount of that award of the commissioners for the benefit of the plaintiff, as ordered by them, that the company have never acquired any right or title to the land appraised, or to any easement growing out of it; and that none can now be acquired under those proceedings. The abandonment of that location, and the adoption of a new route, and the construction of their road thereon, will prevent the acquisition of any such title or the perfection of any such right. It is

its charter or the general law under which it is formed, and in all cases all the conditions precedent to the exercise of this power

insisted, however, that though the corporation have no right to the land, and have never been seised or possessed of the same, yet that the plaintiff, under the provisions of that act, has acquired a vested right to the damages awarded by the commissioners, and that that right became vested in him when the award was made and recorded. The statute requires 'that the commissioners shall determine the damages which the owner of the land may have sustained, or shall be likely to sustain, by the occupation of the same for the purposes aforesaid.' The actual taking and occupation of the same for such purposes is the foundation upon which the binding character of that award is made to rest. It is those circumstances which the commissioners are to take into consideration in ascertaining the amount of damages. If, therefore, the land has never been taken by the company in a manner in which they can legally occupy the same, no damages have arisen, or can arise, from that cause. When the corporation obtains a vested right to the land, or to the easement, the landholder has a vested right to the damages; that specific act which vests the right in them, gives also a vested right to the owner of the land. These respective rights are correlative, and have a reciprocal relation; the existence of one depends upon the existence of the other. If the corporation have no vested right to the land, the owner of the land has no vested right to the price which was to be paid for it. This is the very ground upon which the cases were sustained, to which we were referred in the 2 Me. 179; 4 N. H. 517; and 1 Wend. (N. Y.) 53. Two of these cases were in assumpsit, and the other in debt for the recovery of a sum awarded for land taken for similar purposes. The land-owner was allowed to recover his damages, and was treated as having a vested right to them; as a vested right to the easement in the land had been acquired, for which those damages had been given as a compensation. That is also the doctrine of the case in the 10 How. (U. S.) 395, for on that ground alone was sustained the con-

stitutionality of the act of Maryland, in causing to be vacated the *first appraised*, and ordering a new inquisition to be taken. As there had been no payment or tender of the damages assessed, there was no vested right to the land, and for that reason the act was held constitutional in vacating the first inquisition. On the same ground, and, for that reason specifically assigned, the court in the case of *Harrington v. Berkshire*, 22 Pick. (Mass.) 267, granted a *mandamus* to enforce the payment of damages awarded to the landholder. The road had been laid, the title to the easement *under their statute had vested*, and for that reason, the party had a vested right to the damages awarded. We know of no case, neither have we been referred to any, in which such damages have been recovered, or in which the owner of the land has been considered as having a vested right to the same, when the corporation had acquired no right to the land, or to an easement growing out of it. There is no propriety or consistency in saying that the plaintiff shall recover this compensation for land which has never been taken or purchased from him; that this company shall pay for a right or an easement, which they never had, and which they never could legally enjoy. If the line of this road had been so varied as to run over another portion of the plaintiff's land, it would hardly be contended that he would be entitled to a double compensation; yet such would be the result if this action can be sustained. The cases in England have no definite bearing upon this subject, nor are they in conflict with the construction we have given to the provisions of this charter. In that country, generally, the railroad is located, and its courses definitely defined, when the application is made to Parliament for a charter. When a charter is granted, it is based upon that location, and authority is granted to take that specific land for that purpose. The owner of the land is required to specify the sum he demands for it, and if not assented to, inquisition is to be made to determine the value of the land. *Burkinshaw v. Bir-*

must be performed, and all the steps required must be taken.<sup>1</sup> If the statute requires that the line shall be surveyed and the proposed

mingham & Oxford Ry. Co., 5 Eng. Law & Eq. 492. Under those charters it has been held that if no inquisition is made, the company are bound to pay the sum specified, and not only has payment been enforced by *mandamus*, but the company have, by the same process, been compelled to carry into effect all the powers delegated to them by their charter. *Blakemore v. Glamorganshire Canal Navigation*, 1 My. & K. 162, 163; *Regina v. The Eastern Counties Ry. Co.*, 10 Ad. & El. 531; *Regina v. The York & North Midland Ry. Co.*, 16 Eng. Law & Eq. 299. That doctrine, however, has since been overruled in the Exchequer Chamber, to which the last cited case was carried on a writ of error. *York & N. Midland Ry. Co. v. Regina*, 18 Eng. Law & Eq. 206, 207, 208. Those charters are now treated as conferring conditional powers to take the land on making compensation for it. The observations of JERVIS, C. J., in the last case, are very appropriate and applicable to the rights of the parties under this charter: 'The company may take land; if they do they must make full compensation. The words of the statute are permissive, and only impose the duty of making full compensation to each landholder, as the option of taking the land of each is exercised.' This case, as well as the case of *Burkinshaw v. The Birmingham & Oxford Ry. Co.*, 4 Eng. Law & Eq. 489, establishes the correlative and reciprocal relation existing between the right of the company to the land, and the right of the owner of the land to the damages awarded. If the land has been taken in such a manner as to vest in the company a right to the use and occupancy of it, compensation is to be made; but no right to such compensation can exist where the land has not been taken. The authorities upon the questions involved in this case, we think, are more than ordinarily clear and decisive, and fully establish the principle that the plaintiff has no claim to these damages, as the land has never been taken or occupied by the corporation for the purposes mentioned in their charter; and that the payment of the

money as awarded by the commissioners is necessary, and is to be treated as a condition precedent to the right of the company to the land, or to any easement growing out of it. In *Neal v. Pittsburgh & Connellsville R. R. Co.*, 31 Penn. St. 19, it is held that where a railway company had located their road through a man's land and had the damages assessed by viewers and confirmed by the court, the owner of the land was entitled to execution for the amount as upon a judgment in his favor, although the company had not taken possession, and had instituted proceedings to ascertain the advantages of another route with a view to change the location. The court say: 'Though railroad companies may make experimental surveys at pleasure before finally locating their road, yet certainly it has never been granted to them to have experimental suits at law as a means of chaffering with the land-owners for the cheapest route.' "

<sup>1</sup> *Whiteman v. Wilmington, &c. R. R. Co.*, 2 Harr. (Del.) 514; *Blaisdell v. Winthrop*, 118 Mass. 138; *Adams v. Saratoga, &c. R. R. Co.*, 10 N. Y. 328; *White v. Nashville, &c. R. R. Co.*, 7 Heisk. (Tenn.) 518; *Lund v. New Bedford*, 121 Mass. 286; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *City of Buffalo, in re*; *Derby v. Framingham, &c. R. R. Co.*, 119 Mass. 316; *Levering v. Philadelphia, &c. R. R. Co.*, 8 W. & S. (Penn.) 458; *O'Hara v. Pennsylvania R. R. Co.*, 25 Penn. St. 445; *Wilson v. Lynn*, 119 Mass. 117; *Penn. R. R. Co. v. Porter*, 29 Penn. St. 165; *Blaisdell v. Winthrop*, 118 Mass. 138. The statute must be strictly followed, and if the proceedings are required to be brought in the name of the people, they will be void if not so brought. *Stanford v. Worn*, 27 Cal. 171; *Owners v. Albany*, 15 Wend. (N. Y.) 374; *Curran v. Shattuck*, 24 Cal. 427; *West Va. Transp. Co. v. Volcanic O. & C. Co.*, 5 W. Va. 382; *Dimmick v. Bradhead*, 75 Penn. St. 464; *Darlington v. United States*, 82 Penn. St. 382; *San Francisco, &c. Water Co. v. Alameda Water Co.*, 36 Cal. 639; *Teick v. Conner County*, 11 Minn. 292; *Leslie v. St. Louis*, 47 Mo. 474.

route filed in the Secretary of State's office,<sup>1</sup> or that the damages shall be appraised and tendered to the land-owner,<sup>2</sup> or secured,<sup>3</sup> all these things must be done before the right to enter upon the land exists, as well as all other things required by the act creating the corporation or by the general statutes.

SEC. 233. **Abandonment, effect of: What is.**—A railway company may, if it chooses to do so, abandon a right of way which it has acquired under the statute, and in such a case, unless it has, under the statute, acquired an unconditional fee in the land, it will revert to the former owner.<sup>4</sup> But the company is bound to pay the land-owner the damages sustained from such taking, and it cannot relieve itself from liability therefor by tendering a deed to the land-owner, although such circumstance may go in reduction of damages.<sup>5</sup> Where, however, proceedings have been instituted to assess the damages, and money has been paid to the sheriff or other depository designated by the statute, the company cannot, upon an abandonment of the location, recover back the money.<sup>6</sup> If, after having located its road through one part of a person's land, and the damages have been duly assessed, it abandons such location and takes another part of the same person's land, the owner cannot in an action of trespass claim any damages for the first taking, as he is concluded by the award.<sup>7</sup> The question as to whether there has been an abandonment or not, is usually one of fact, to be determined by the circumstances of each case, and mere non-user for a long period, less than the period prescribed in the statute of limitations, as in one case thirteen years, is not sufficient to establish an abandonment.<sup>8</sup>

<sup>1</sup> *Morris & Essex R. R. Co. v. Blair*, 9 N. J. Eq. 635.

<sup>2</sup> *Stacey v. Vermont Central R. R. Co.*, 25 Vt. 39; *Starr v. Camden & Amboy R. R. Co.*, 24 N. J. L. 592.

<sup>3</sup> *Bensley v. Mountain Lake, &c. Co.*, 13 Cal. 346.

<sup>4</sup> *Hastings v. Burlington, &c. R. R. Co.*, 38 Iowa, 316.

<sup>5</sup> *Pinkerton v. Boston & Albany R. R. Co.*, 109 Mass. 527. Abandonment is, however, a defence to a claim for any additional damages on an appeal from *ad quod damnum* proceedings. *Hastings v. Burlington, &c. R. R. Co.*, *ante*.

<sup>6</sup> *Hastings v. Burlington, &c. R. R. Co.*, *ante*.

<sup>7</sup> *Baltimore & S. R. R. Co. v. Compton*, 2 Gill (Md.), 20.

<sup>8</sup> *Barlow v. Chicago, Rock Island, &c. R. R. Co.*, 29 Iowa, 276. In *Central Iowa R. R. Co. v. Moulton & Albia R. R. Co.*, 57 Iowa, 249, it appeared that in 1865 the Iowa Central R. R. Co. was organized for the purpose of constructing a railroad from the "south line of the State by way of Oskaloosa to Cedar Falls, in Black Hawk County," and previous to 1868 the company procured the right of way for the purpose aforesaid from the town of Moulton to Albia, and did some grading and other work on the right of way prior to and during 1868. In 1869 the Central R. R. Co. of Iowa was organized, and it acquired by purchase all the rights of the company first named south of Oskaloosa, including the right of way, grading, and other work done thereon between Moulton



But an abandonment may be inferred from a mis-user, — as, if the property is rented to tenants for the purposes of a business entirely

and Albia, and it was the right of way between said towns which the defendant sought to condemn under the right of way act. Beginning in 1869, and including 1871, the Central R. R. Co. of Iowa constructed and purchased a line of railroad from Albia north to Northwood, and the same has been continuously operated. After 1871 additions were made to the road consisting of about ten miles of coal and side tracks, and the erection of four station-houses, and in that and the succeeding year the plaintiff caused the line between the towns of Albia and Moulton to be surveyed. In October, 1874, the company became financially embarrassed, and a receiver was appointed, who had charge of the road until June, 1879. Previous to that time the road was sold under a decree of foreclosure and purchased by a trustee, who, under the direction of the court, turned it over on the seventeenth day of June, 1879, to the plaintiff, who had been duly organized in May of that year. The petition stated that neither of the companies abandoned the line or right of way between Moulton and Albia, but that the construction of the road between those towns was prevented by financial embarrassment, and that plaintiff "now intends and expects to proceed with despatch to build the whole distance from Moulton to Albia, or cause to be built by other parties for the plaintiff and in its interest." These allegations were denied in the answer. The condemnation proceedings were commenced on the fifth day of July, 1879, and the notice to the sheriff directed him to have the right of way appraised as the property of the Iowa Central R. R. Co., or its representatives, under and in pursuance of an act of the General Assembly passed in 1870, as amended by an act passed in 1874, to amend section 1260 of the Code. The notice directed the sheriff to have assessed the roadbed and right of way, "excluding the work done thereon." The act of 1870 is in substance the same as sections 1260 and 1261 of the Code, and the act of 1874 amending section 1260 is as follows: "In any case where a railway constructed in whole or in part has ceased to be operated or used for more than five years, or in any case where the construction of a railway has been commenced by any corporation or person and work on the same has ceased, and has not been in good faith resumed for more than five years, and the same remains unfinished, it shall be deemed and taken that such corporation or person thus in default has abandoned all right and privilege over so much as remains unfinished, as aforesaid, in favor of any other corporation or person which may enter upon such abandoned work, as provided in section 1261" of the Code. This statute went into force on the fourth day of July, 1874. Section 1261 of the Code provides that the right of way, work, and grading so abandoned may be condemned as other property; "but parties who have previously received compensation in any form for the right of way on the line of such abandoned railway which has not been refunded by them shall not be permitted to recover the second time; but the value of such roadbed and right of way, excluding the work done thereon, when taken for a new company, shall be assessed to the former company or its legal representative." SEEYERS, J., said: "Has there been an abandonment of the line between Moulton and Albia within the meaning and intent of the statute? It is insisted there has not, because there must be an abandonment of the whole road or projected line; that the statute does not contemplate a part of a road shall be regarded as abandoned when the greater portion has not only been constructed, but is being actually operated. If such had been the legislative intent, it would, it is said, have been without doubt clearly expressed as being that such part which has ceased to be operated, or upon which part work has ceased for the period named, should be regarded as abandoned. The question to be determined is one of fact, and no general rule can be laid down applicable to all cases. The statute clearly, we think, contemplates there may be an abandonment of a part of a constructed railway. But the fact that the work of construction

foreign to that for which the land was taken,<sup>1</sup> although from the carrying on of such business by the tenants the company derives a profit through the increase of its freighting business. So, as it is the duty of a railway company to operate the whole of its road, if it neglects to do so for any considerable period without a valid excuse for its neglect to do so, such non-user will operate as an abandonment.<sup>2</sup>

The application of land devoted to one public use, in whole or in part to another public use, *not substantially different in its objects and purposes from the former*, does not operate as an abandonment. Thus it has been held that a canal may be converted into a railroad,<sup>3</sup> or a plank-road into a railroad,<sup>4</sup> subject only to the payment of such

has ceased for the period named, may, or may not, amount to an abandonment of a part of a contemplated road. Each case must be solved in accordance with the facts and circumstances. The usual and ordinary mode of constructing railways, we understand, is to commence at a recognized *terminus*, and prosecute and finish the work of construction continuously from such point. Such was not done in this instance. But when the work of construction was resumed in 1869 at Albia, it proceeded steadily and continuously from that point north, instead of south to Moulton. If there were sufficient reasons for taking this course, the evidence fails to so show. The right of way in question had been procured at that time, and grading had been done thereon. Why was it not then, or at some subsequent time, utilized? Nothing, except the survey above stated, toward the construction of the road was done for a period of five years preceding the fourth day of July, 1879. The case, therefore, is within the statute, unless the reasons urged by the plaintiff excuse performance, or tend to show an intent not to abandon the portion of the road aforesaid. The survey alone does not, we think, show a resumption of the work of construction in good faith, conceding it was made after July 4, 1874. Nor can the construction of coal and side tracks, and the erection of station-houses, between Albia and Northwood, have any tendency to show the road between Moulton and Albia had not been abandoned. Whether it was absolutely essential the side tracks aforesaid should

be constructed has not been shown. But conceding it was, then the intention to improve and extend the road between Albia and Northwood has been shown, while that portion between Moulton and Albia was, for the time being at least, abandoned or permitted to go to waste. There is not a single fact or circumstance which tends to show an intent to resume work south of Albia until after the commencement of the condemnation proceeding; and all there is now is an assertion of a purpose on the part of the plaintiff to either proceed with the work of construction or have it done by some one in its interest. If this be sufficient under the statute, it comes too late. The fact that the company under whom the plaintiff claims became financially embarrassed and was placed in the hands of a receiver, and therefore could not finish the work of construction, cannot be regarded as a valid excuse under the statute, which embraces all cases or 'any case.' We have no doubt such a case was contemplated by the statute. Because of financial embarrassments, the construction of railways frequently cease for a longer or shorter period, and the General Assembly in its discretion has fixed a time when the rights obtained by such company shall be regarded as abandoned."

<sup>1</sup> Proprietors of Locks, &c. v. Nashua & Lowell R. R. Co., 104 Mass. 1.

<sup>2</sup> People v. Albany & Vermont R. R. Co., 24 N. Y. 261.

<sup>3</sup> Hatch's Case, 18 Ohio St. 92. See sec. 234, "Change of Use."

<sup>4</sup> Brainard v. Missisquoi R. R. Co., 48

damages to the land-owner as he may sustain from the change in the use. Where the entry in the first instance was lawful, upon an abandonment of the route the company may remove all fixtures placed by it upon the land;<sup>1</sup> but if the company entered without right, all the fixtures placed by it upon the land become a part of the soil and belong to the owner of the land; and if the company subsequently takes proceedings to obtain the land, upon assessment of the damages the owner of the land is entitled to have the value of the track and other fixtures assessed to him as a part of the damages.<sup>2</sup>

A railway corporation having authority to condemn lands for its roadway, proceeded to exercise the right and condemned the plaintiff's land, but without constructing its road conferred its rights upon another corporation. The court held that, although the transfer was not expressly authorized by statute, yet there was no abandonment of the land, and that, as the plaintiff's interest was in no way affected by the transfer, he could not be heard to complain.<sup>3</sup> A rail-

Vt. 107. In this case it is held that there is no such disparity in the nature of the use of a plank-road and a railroad as to entitle the owner of the fee, whose land was condemned for the former, to damages for its conversion into a railroad, as no different or greater burden was imposed upon his land by the latter than by the former, and that the damage he sustained by reason of being deprived of the use of the plank-road being such as he sustained in common with all the rest of the public, he was entitled to no compensation therefor, but that he was entitled to damages for the expense of constructing a private way from his premises, rendered necessary by the construction of the railroad. This doctrine, which upon its face seems absurd and contrary to all authority, is reconcilable with the cases and with human experience, upon the ground that, from the facts found, the plaintiff's estate sustained no additional damage from the construction of the railway, except as to the expense of the construction of the new way, which was allowed him; and the statement of the court, that as no different or greater burden was imposed upon his estate he was not entitled to damages, merely amounts to this, — that while the plaintiff sustained no additional damage from the construction of the railway in

place of the turnpike, except as to the expense of the new way, his damage must be restricted to that. If a new burden was not imposed upon his estate, he would not have been entitled to damages to the extent of the expense of constructing the private way. The truth is, that, owing to the location of the plaintiff's estate, there were no other consequential damages to which he was entitled. If there had been, upon the same principle that he was allowed damages for the expense of the private way, he was entitled to have them assessed to him also; and the case is in no sense an authority for the broad proposition to which it has been cited by some authors, that a turnpike may be converted into a railway without the payment of additional damages to the land-owner; but is rather a direct authority for the proposition, that where a turnpike is condemned for a railway the land-owner is entitled to recover such damages as he actually sustains from the change of use.

<sup>1</sup> *Wager v. Cleveland, &c. R. R. Co.*, 22 Ohio St. 556.

<sup>2</sup> *Matter of Long Island R. R. Co.*, 6 T. & C. (N. Y.) 298; *Graham v. Connorsville, &c. R. R. Co.*, 36 Ind. 463.

<sup>3</sup> *Crolley v. Minneapolis & St. Louis R. R. Co.*, 30 Minn. 541.

way company may discontinue proceedings instituted by them pursuant to the act delegating the power, to acquire title to lands, at any time before the title is acquired and the rights resulting therefrom have become vested in the property-holder.<sup>1</sup> But the corporation instituting such proceedings becomes answerable to the owner for all damages occasioned by them.<sup>2</sup> Thus a railway company having power to take compulsorily certain portions of an estate, served notices to treat for them. They afterward abandoned part of their undertaking, including the land comprised in some of the notices, but took the rest and paid the purchase-money into court, the estate in question being the subject of a testamentary settlement. Before the abandonment certain costs, charges, and expenses had been incurred by the tenant for life under the settlement, and certain other costs were subsequently incurred in an unsuccessful attempt to obtain compensation for not going on with the notice to treat in respect to the abandoned portions. It was held, on a petition by the tenant for life for investment of the fund in court, that these costs, charges, and expenses might properly be paid out of the fund before investment.<sup>3</sup> After the report of the commissioners or viewers is filed and confirmed, the rights of the parties are determined, subject only to the right of review as to the amount of appraisal, and the company cannot avoid the payment of the damages.<sup>4</sup>

<sup>1</sup> Matter of Commissioners of Washington Park, 56 N. Y. 144.

<sup>2</sup> *Leisse v. St. Louis, &c. R. R. Co.*, 2 Mo. App. 105.

<sup>3</sup> *Re Strathmore Estates*, L. R. 13 Eq. 338.

<sup>4</sup> Matter of Rhinebeck, &c. R. R. Co., 67 N. Y. 242; *Harding v. Metropolitan Ry. Co.*, L. R. 7 Ch. 154; *East London Union v. Metropolitan Ry. Co.*, L. R. 4 Exchq. 409.











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